IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-921

JOHN J. WILD, M. D.,

Appellant,

vs.

FRANK M. RARIG, MINNESOTA FOUNDATION, a Minnesota nonprofit corporation, and AMHERST H. WILDER FOUNDATION, a Minnesota nonprofit corporation,

Appellees.

JURISDICTIONAL STATEMENT

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Comes now the Appellant herein and respectfully shows the Court, pursuant to Rule 15 of the Supreme Court of the United States:

(a) The the following decisions were made:

(1) Official Opinion is Minnesota Supreme Court #44238 (Appendix A-

[1975] ___ Minn. ___, 234 N.W. 2d 775).

(2) Official Opinion denying Petition for Rehearing (Appendix B).

(b) The jurisdiction of this court is invoked on the following grounds:

(i) This is an appeal from a judgment by a temporary substitute state supreme court invalidating and setting aside a judgment in favor of the appellant of over 16-million dollars (nearly 19-million at the time of the final appellate decision below), wherein is drawn into question the validity of a state statute on the ground that it is repugnant to the Constitution of the United States and the decision(s) of both the Minnesota temporary and permanent Supreme Courts below is in favor of its validity. (The regular supreme court below disqualified itself en banc because of serious compromising of their integrity and responsibility as judicial officers wherein their qualifications became the subject of affidavits of prejudice and motions for recusation. Nonetheless, the disqualified court "lobbied" through the Minn-

esota Legislature, in a matter of days, a special statute allowing the disqualified judges to appoint their own replacements thereby allowing the prejudiced judges to essentially control the appeal.) The statute pursuant to which this appeal is brought is 28 U.S.C.A. 1257 (2) and 28 U.S.C.A. 2106.

(ii) The date of the original opinion by the substitute Minnesota Supreme Court is January 10, 1975. It was filed on January 10, 1975, but judgment thereon was not entered until October 20, 1975. Pursuant to order of the permanent court and the Rules of Civil Appellate Procedure for Minnesota, a Petition for Rehearing was filed on or about April 15, 1975. An order denying the petition by the substitute panel was received on August 12, 1975, by appellant's attorney but the order had been filed on August 8, 1975. The Chief Judge of the permanent Minnesota Supreme Court ordered the remand of the case on October 6, 1975. The notice of appeal was filed with the Clerk of the Minnesota Supreme Court, who is possessed of the record, on Monday, October 27, 1975.

(iii) 28 U.S.C.A. 1257 (2) - pertinent provisions as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be received by the Supreme Court as follows:
>
> (1) . . .
>
> (2) By appeal, where is drawn into question the validity of a statute of any state on the grounds of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity." (Compare 28 U.S.C.A. 2103 insofar as it may be relative to corollary issues.)

28 U.S.C.A. 2106:

> "The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

(iv) The following cases, it is believed, amply sustain the exercise of jurisdiction in this case:

See 28 U.S.C.A. 1257 (2), cited

above;

Bantam Books, Inc. v. Sullivan, R. I. 1963, 83 S. Ct. 631, 372 U.S. 58, 9 L. Ed. 2d 584;

Winters v. People of State of New York, N.Y., 1948, 68 Sup.Ct.665. 338 U.S. 507, 92 L.Ed. 840;

Near v. State of Minnesota, Minn. 1931, 51 S. Ct. 625, 28 U.S. 697, 75 L. Ed. 1357;

Duncan v. Louisiana, 1967, 391 U. S. 145, (see esp. pp. 168-170);

Justice Black's Appendix in Adamson v. Calif., 1947, 322 U.S. 46 @ p. 73;

Griswold v. Conn., 1961, 381 U.S. 479;

Cooper v. Aaron, 1958, 358 U.S. 1;

Brown v. Board of Education, 349 U.S. 294;

U. S. v. United Mine Workers, 330 U.S. 258;

and, see especially,

Payne v. Lee, 1946, 222 Minn. 269, 24 N.W. 2d. 259; and,

People v. Suffolk Common Pleas, 18 Wend. N.Y. 550.

(v) Minnesota Statutes, 1974, Volume I, p. 50, also cited as Laws, 1973, Chapter 18, ss. 2, Governor App. March 9, 1973, also known as Minnesota Statutes Annotated 2.724, subd. 2.:

" CHAPTER 18-H.F.No.430

An act relating to the supreme court; providing for assignment of district judges and justices of the supreme court; amending Minnesota Statutes 1971, Section 2.723, Subdivision 2.

Be it enacted by the Legislature of the State of Minnesota

Section 1. Minnesota Statutes 1971, Section 2.724, Subdivision 2, is amended to read:

Subd. 2. SUPREME COURT; TEMPORARY ASSIGNMENTS. To promote and secure more efficient administration of justice, the chief justice of the supreme court of the state shall supervise and coordinate the work of the district courts of the state. The supreme court may provide by rule that the chief justice not be required to write opinions as a member of the supreme court. Its rules may further provide for it to hear and consider cases in divisions, and it may rule assign temporarily any retired justice of the supreme court or one district judge at a time to act as a justice of

the supreme court. Upon the assignment of a district judge to act as a justice of the supreme court a district judge previously acting as a justice may continue to so act to complete his duties. Any number of justices may disqualify themselves from hearing and considering a case, in which event the supreme court may assign temporarily a retired justice of the supreme court or a district judge to hear and consider the case in place of each disqualified justice. At any time that a retired justice is acting as a justice of the supreme court under this section, he shall receive, in addition to his retirement pay, such further sum, to be paid out of the general fund of the state, as shall afford him the same salary as an associate justice of the supreme court.

Section 2. This act is in effect upon final enactment.

Approved March 9, 1973.

Changes or additions indicated by underline, deletions by ~~strikeout~~."

(c) The following questions are presented by this appeal:

(1) Whether or not the appellant has been deprived of his 14th Amendment Civil Rights to due process and equal protection by the enactment of (as a result of fraudulent criminal lobbying and

legislative manipulation by the permanent Minnesota Supreme Court) and application to his case of Minnesota Statutes, 1974, Volume I, p. 50, also cited as Laws, 1973, Chapter 18, ss. 2, Governor App. March 9, 1973, also known as Minnesota Statutes Annotated 2.724,subd. 2, a statute which allows disqualified judges to appoint their own replacements. Thus, it was special legislation for this case designed to give major discretionary powers to supreme court judges who are admittedly prejudiced officers and visitors of the defendant-appellee foundations, in effect continuing control of the appeal by the disqualified court and allowing it to decide its own appeal.

(2) Whether or not Minnesota Statutes, 1974, Volume I, p. 50, also cited as Laws, 1973, Chapter 18, ss. 2, Governor App. March 9, 1973, also known as Minnesota Statutes Annotated 2.724,subd. 2, is inherently violative of the 14th Amendment by allowing disqualified supreme court judges to appoint their own replacements, thus making the disqualification reasonably meaningless as a

matter of due process and equal protection.

(3) Whether or not the appellant has been deprived of his 14th Amendment Civil Rights to due process and equal protection by corrupt and discriminatory appellate proceedings.

(4) Are there any differences between United States Constitutional standards of equal protection and due process when applied to civil litigation as compared to criminal prosecutions? Or, between appellate proceedings and trial? If so, what are the criteria? What are the justifications? What are the differences?

(5) What are the required United States 14th Amendment standards of fairness, impartiality and judicial administrative proceedings both substantively and procedurally in state appellate litigation? i.e., are civil jury verdicts subject to invalidation without federal constitutional restraints, thus, effectively negating the right to jury trial and a fair appellate hearing? If not, what are the constitutional standards under the 14th Amendment that must be

maintained by an appellate court to finally and permanently deprive a citizen of his proprietary interest in a judgment and for that appellate tribunal to change established standards of law and fact? Or, stated another way, can a prejudiced and corrupt appellate court arbitrarily void a jury verdict and judgment in a civil case without infringing due process and/or equal protection?

(6) At what point, if at all, does a party to litigation constitutionally (under the 14th Amendment guarantees of due process and equal protection) waive his right to a statutorily-created appellate review by corrupting the appellate judiciary?

(7) To what degree, if at all, does the United States Constitution require reasonably equal standing, both economically and influentially, before the court in civil appellate proceedings? What way do these standards effect the power of the appellate courts to set aside costly trials and large verdicts and order new trials, thus, in a practical sense, permanently denying a poor plaintiff due process and equal protection by subject-

ing him to additional catastrophic legal fees and infinite delays?

(8) What are the United States Constitutional standards (in selection and qualification) of impartiality of appellate judges?

(9) What are the United States Constitutional standards (as to due process and equal protection civil rights), if any, of the contents of an appellate opinion and an order denying a petition for rehearing? 'e.g.,as to fact-finding, as to law and reasoning?

(10) Are there any 14th Amendment or other United States Constitutional limitations on an appellate court's usurpation of the fact-finding power of a jury and the abrogation of the legal function of the trial court? If so, what are the standards? and,

Did the Minnesota Supreme Court and its substitute hearing panel violate "these standards" so as to deprive the appellant of due process and equal protection?

(11) Is the failure to follow Rules of Civil Appellate Procedure and/or the failure to apply established laws by the

Minnesota Supreme Court and its substitute hearing panel a violation of due process and equal protection?

(12) Can the granting of a new trial standing alone constitute a violation of due process and equal protection when such an order is manifestly fraught with endless delay. a destruction of the trial court function, a nullification of the right to a jury trial, consequently making the new trial an exercise in futility?

(d) The following is a concise resume of the stages during the proceedings below in which the federal questions sought to be reviewed were raised pursuant to Rule 15, 1. (d):

Ten days before the defendants at trial level (appellees herein) filed their notice of appeal and shortly after their motion for a new trial was denied, a bill sponsored by the Supreme Court of Minnesota was introduced contemporaneously in both houses of the Minnesota Legislature (February 5,1973). The bill was reported out of both committees, AGAIN CONTEMPORANEOUSLY, on the day the appellees filed their notice of

appeal to the Minnesota Supreme Court, to-wit: February 15, 1973.

The appellant (plaintiff at trial) herein was unaware of such action or the contents of the proposed legislation (statute). No public hearings were noticed to the appellant and the bill was rushed through and signed by the governor on March 9, 1973.

The first knowledge the appellant had that a bill of any nature was being sponsored, or even contemplated, by the Supreme Court for "special" handling of this case was when the Minnesota Supreme Court would not accept (even for filing) affidavits of prejudice signed on February 15, 1973 by Dr. Wild and his counsel, immediately after receipt of the notice of appeal and presented for filing the next day.

The clerk at first accepted the affidavits of prejudice but returned them with a covering letter dated February 21, 1973, stating, "At the instruction of the court, I am returning to you the 'affidavits of prejudice' sent for filing in the above entitled matter . . . For your information, I am enclosing a copy of the memorandum of the court relating to its

efforts . . . "

The memorandum stated inter alia:

> ". . . The court has requested that the legislature provide such legislation so as to permit some or all of its members to substitute district court judges in their place if circumstances warrant . . . " (Emphasis ours.)

While the letter was dated February 21, 1973, it was not received until February 23, 1973, the day AFTER (Feb. 22, 1973) the bill was passed contemporaneously again by both houses. (Ed. Nt. Minor verbal changes were required and the bill was again repassed contemporaneously on March 5, 1973, and signed by the governor on the 9th.) On March 12, 1973, motions for recusation and disqualification were filed. (These motions were never acted upon directly nor were the reasons for the supreme courts "en banc" self-disqualification made public or disclosed in anyway in these proceedings.)

The appellant (plaintiff-respondent below) was informed of the essential text of the new "law" in a letter dated March 12, 1973, again from the Clerk of the Minnesota Supreme Court, acting on behalf

of the supreme court, advising the enactment of the new "law" and informing the parties that the entire court was disqualifying itself and, pursuant to the new statute ". . . may assign temporarily . . . a district judge to hear and consider the case in place of each disqualified justice." (Apparently quoting from the Act. Chief Judge Knutson had designated the Clerk of Court, Mr. McCarthy, as official recipient and dispenser of court matters. This usage was also adopted by his replacement Chief Judge Sheran.)

The appellant herein immediately procured a copy of the statute and directed inquiry to the court as to its implementation in the Wild case. (At this time, other than for the time relationship, the appellant did not know of the circumstances or representations that had been made to the legislature inducing the bill's passage.)

> " March 15, 1973
>
> Dear Mr. McCarthy:
>
> Re: Wild v. Rarig, et al.
> No. 44238
>
> This will acknowledge your letter of March 12, 1973. After

analyzing its contents and reading House File 430, we have several questions:

1. Will the Court be issuing a written order of disqualification specifying its application not only to themselves but to the new Chief Justice or any replacements or additions to the Supreme Court during the interim period referred to in Paragraph 3 of your letter?

2. Specifically, what method will be used in choosing the panel, i.e., will each disqualified justice choose his own replacement? Will the parties be allowed through their counsel to participate in the selection process? Will the court accept a stipulated panel prepared by the parties? Does the court prefer to name its own panel or does it prefer the parties to agree as to the panel?

Dr. Wild feels that if the judges appoint their own replacements, his chances for a fair hearing are not improved but may in fact be lessened, so your answers to the above questions are crucial.

3. I understand from your letter that there will be no assignment of judges to this case until after the filing of all briefs and appendixes. Is this correct and will this be included in the order if there is to be one?

4. Would the Supreme Court be willing to accept a panel of judges appointed by the Governor or, in the event he is disqualified, by the Lieutenant Governor?

5. Will the court allow the parties to examine the panel prior to its being authorized and empowered to hear the appeal to determine individual bias and prejudice?

6. Will the court allow a hearing on the merits of challenges for cause to the panel?

7. Does the court have any plan for avoiding the obvious criticism indicated above with reference to disqualified judges making their own appointments? No matter how well-intentioned the appointment may be, it is difficult to see how such appointees could be impartial in view of their relationship to those who appoint them.

8. Would the court be willing to accept a panel including lawyers, municipal, county and probate judges if the parties so stipulate?

We would be grateful for your considered answers to these questions so that we may determine the effect of your March 12, 1973 letter on our formal motions filed with you on Tuesday, March 13, 1973.

Very truly yours,

James Malcolm Williams

JMW:js
cc: Mr. Henry Halladay

Mr. William P. Luther "

(Emphasis ours for this Statement.)

The correspondence continued on the following dates: March 30, 1973; March 22, 1973; May 17, 22 and 30, 1973, but to no avail. In this regard, no answer was received to the March 15, 1973 letter. The court's position or "ruling", if you will, is as follows (Letter of May 22, 1973, McCarthy to Williams):

> "On instructions from the court, I wish to inform you that your case will be handled the same as any other case under the rules of the court and the statutes of the state. When the proper time comes, the court will appoint replacements for those members of our court who have disqualified themselves." (Emphasis supplied.)

We replied as follows:

" May 30. 1973

Dear Mr. McCarthy:

Re: Wild v. Rarig, et al
No. 44238

With all due respect, the questions posed in my March 15, 1973 letter, in my judgment, are not answered by the statement ". . . I wish to inform you that your case will be handled the same as any other case under the rules

of the court and the statutes of the state" made in your letter of May 22, 1973.

If it is the position of the disqualified court that they do not wish to answer the questions contained in the March 15, 1973 letter because of their disqualification, Dr. Wild feels the record should be clear on that point, at least.

If, on the other hand, it is the court's position that we are not entitled to have these questions answered on the grounds that the information is contained in sources available to us, would you be so kind as to specify the sources.

A third possibility is extant, that the disqualified court feels that the questions involved are immaterial and irrelevant matters insofar as due process requirements under the State and Federal Constitutions are concerned.

If none of the three postulates posed above is applicable, because of our possible allegorical myopia, any help you can give us would be deeply appreciated.

Very truly yours,

James Malcolm Williams

JMW:js
cc: Chief Justice Oscar Knutson
Chief Justice-Appoint Robert Sheran
Mr. Henry Halladay
Dr. J. J. Wild "

The Minnesota Supreme Court did not reply to this letter nor did it appoint the panel of replacement judges by any nethod to our knowledge at that time. Consequently, on August 10, 1973, a motion was filed to dismiss the appeal and for a public hearing thereon involving examination of the regular court:

> " Respondent above-named hereby moves for an Order of this Court scheduling the Respondent's Motion to Dismiss Appeal for a public hearing with the right of oral argument and the right to examine witnesses including, but not limited to, the Judges and Retired Judges of the Supreme Court.
>
> The Respondent herein respectfully requests that, notwithstanding Rule 127, cited infra, a public hearing on the above Motion be scheduled by the Supreme Court after due notice to the parties as a matter of due process, fairness to the parties and respect for the dignity, integrity and function of the law and of the highest appeal tribunal in this State and in the spirit manifested by this Court in Payne v. Lee (1946) 222 Minn. 269, 24 N.W. 2d. 259 @ 263, quoting a great American jurist, Judge Bronson, on 18 Wend N.Y. 550:

> "NEXT IN IMPORTANCE TO THE DUTY OF RENDERING A RIGHTEOUS JUDGMENT IS THAT OF DOING IT IN SUCH A MANNER AS WILL BEGET NO SUSPICION OF FAIRNESS AND INTEGRITY OF THE JUDGE." (Caps ours.)

Said Motion will be based upon all the files, records and proceedings had herein and, specifically, all documents and affidavits appended to the Motion for a Public Hearing on Respondent's Motion for Disqualification and Recusation and Respondent's Motion for Disqualification and Recusation, the attached affidavits and memoranda of law and the testimony under oath of the members and retired members of the Supreme Court of the State of Minnesota, if such be allowed at the time of hearing, if such hearing be allowed. It is expressly understood that the making of this Motion in no way constitutes a waiver of the right of the Respondent to have this motion heard in public and with proper testimony by the members of the Supreme Court and others, notwithstanding any provisions to the contrary to Rule 127 of the Rules of Civil Appellate Procedure. Rather, the Respondent specifically asserts his constitutional right to a public hearing and his right to examine the Supreme Court Judges as to their acts. Further, these

motions are made and filed without prejudice to any rights guaranteed the Respondent under the Federal and State Constitutions. Specifically, the motions do not constitute a modification of the Respondent's contention that he cannot receive either due process or a fair and impartial appellate hearing before the Supreme Court of the State of Minnesota or its appointees. This contention is poignantly manifest in the failure of a response of a definitive nature from the Supreme Court to the Respondent's questions relating to procedural and substantive due process expressed in a March 15, 1973 letter and reiterated thereafter in subsequent correspondence.

The formal motion categorically points out that:

" 1. The appellant corporations waived or are estopped from asserting their rights to appellate review and that said waiver or estoppel extends to the appellant Rarig in that his liability is limited to matters arising out of and in the course and scope of his employment by the appellant corporations and that said acts were authorized, directed and ratified and adopted as their own by the appellant corporations.

2. The appellant corporations constructively and impliedly waived or are estopped from asserting their appellate review rights by their own acts of commission or omission and that said waiver or estoppel extends to the appellant Rarig in that his liability is limited to matters arising out of and in the course and scope of his employment by the appellant corporations and that said acts were authorized, directed, ratified and adopted as their own by the appellant corporations.

3. The Supreme Court of the State of Minnesota, acting by omission or commission in its dual capacities as Supreme Judges of the State of Minnesota and as visitorial officers of the appellant corporations, such acts being expressly or impliedly authorized by the appellant corporations, have so compromised the constitutional rights of the Respondent herein as to constitute a waiver or estoppel implied in law and fact of the appellant corporations' statutory and constitutional rights to appellate review."

Notwithstanding the provisions of Minnesota Statutes Annotated 542.13, which forbids the exercise of discretionary functions by disqualified judges, the court acted, contrary to its own disqualification, continued its refusal to

reply to the March 15, 1973 letter and request, and denied the motions without reasoning, fact or law or memorandum on August 27, 1973:

> "It is hereby ordered that respondent's motion to dismiss the appeal in the above entitled case be and the same is hereby denied.
>
> August 27, 1973 By the court:
>
> Oscar Knutson, Chief Justice"

At this point, the appellant proceeded under the Federal Civil Rights Statute and asked for federal intervention because of the manifest breakdown in constitutional judicial administration in Minnesota. The federal district court refused to intervene and the 8th circuit affirmed without reasoning, fact, law, an opinion or memorandum. (See U.S. District Court, 4th Division of Minnesota File No. 4-73 Civ. 473, and 8th Circuit File No. 73-1137.)

The members of the regular Minnesota Supreme Court and their counsel, the State's Attorney General, claimed, astonishingly, without logic or factual support, that a deprivation of due process

and equal protection involving a near-complete corruption of the judicial process in Minnesota was not a "substantial federal question".

The 8th Circuit added to the constitutional indifference of the Minnesota Supreme Court by irrationally calling the entire matter "frivolous". (See Order of 3/22/74, 8th Circuit, CS.74-1137). The 8th Circuit refused upon special request, again without reasoning, law or facts, to issue an opinion. (See Order dated 5/17/74.)

Dr. Wild and his counsel continued to request answers as to substantive and procedural due process as well as equal protection matters under the new statute. The Minnesota Supreme Court continued to ignore the entreaties.

On February 15, 1974, appellant's counsel wrote to the court stating, "We have not yet received a reply to our letter of May 30, 1973. . . As outlined in our letter of March 15, 1973, and subsequent diligent correspondence . . . It has now been nearly a year since these simple questions, <u>the answers to which are required by basic due process</u>

were put to the court. The vital issues posed therein remain unanswered . . . " (Emphasis supplied for this Statement.) McCarthy's letter of March 1, 1974 ignores the matter and reiterates ". . . conformity with law in due course . . . " but no specific information. Our March 11, 1974, letter to the court via Mr. McCarthy states:

> ". . . We note that our repeated requests for definitive and responsive answers to the questions propounded in our March 15, 1973 letter continue to be ignored . . . The court is continuing to absquatulate from its constitutional responsibilities . . . "

Because of the Minnesota Supreme Court's unconstitutional behavior in refusing to disclose the procedures to be followed in the application of the statute to the Wild case, our suspicions as to the circumstances of its enactment were increased and on or about February 15, 1974, Attorney (and now law professor at Hamline University Law School) John Remington Graham was instructed to investigate for illegalities.

(See Affidavit of J. R. Graham of April 19, 1974, appended to Motion presented to temporary panel on May 6, 1974, noted infra.) He determined that the bills were considered by the sub-committee on Judicial Administration of the Senate on Feb. 6, 1974, the House Committee on Feb. 8, 1974, and the Senate Committee on the Judiciary on Feb. 13, 1974, and that tape recordings of such hearings were made. Mr. Graham listened to the tapes of the senate hearings which show the Supreme Court Administrator acting for the court in conjunction with the chairman, Senator Jack Davies, fraudulently representing material evidence of prior constitutional provisions and acts thereby inducing the passage of the Act by felonious means. (See Minnesota Statutes Annotated 609.425 which makes it a felony to corrupt the legislature by that means; see also Complaint of Judicial Misconduct, esp. pp. 9 to 13, dated April 15, 1974, and pages 2-4 of Mr. Graham's affidavit, cited supra.) The house committee tape had been tampered with. The tape was located but there

was nothing on it about the bill. As Mr. Graham graciously commented in his affidavit: ". . . It would appear that relevant portions of the tape had been erased. The minutes of the committee show that Mr. Klein appeared to explain the purpose of the bill . . . " Undoubtedly, the same fraud was perpetrated upon the House. (Parenthetically, a former attorney for the St. Paul Insurance Companies, now regular Chief Judge of the Minnesota Supreme Court Sheran, opposed rectifying this fraudulent corruption, thus killing a bill which would have been in conformity with the "old Constitutional" provisions which were misrepresented to the legislature by the Minnesota Supreme Court).

Finally, on April 10, 1974, the temporary panel was named and the hearing was set for May 22, 1974. (See Order dated April 10, 1974.)

Dr. Wild immediately moved that the temporary panel submit to voir dire for qualification in view of the gross appearances of prejudice, impropriety and criminality and to divulge and make public their prior contacts with the

regular court and the circumstances of their appointments. (Ed. Nt. Temporary panel Chief Judge Rosengren, himself also a former counsel for St. Paul Companies, called the criminal legislative corruption felony a mere "technicality". See Transcript of proceedings before panel, May 6 and May 21, 1974.) Further, "That . . . the . . . judges declare unconstitutional (and contrary) to Amendment XIV of the U. S. Constitution as applied to this cause, Chapter 18 of Minnesota Laws of 1973 (as it) . . . includes private or discretionary appointment (by a disqualified judge) of any substitute judge to decide such cause . . . "

That they ". . . declare null and void . . . Chapt. 18. . . . (because) inter alia . . . was enacted through unethical, wrongful, fraudulent, tortious and felonious acts, quasi-fiduciary non-disclosure, concealment and misrepresentation of facts . . . " by the Supreme Court of Minnesota acting through its Chief Administrator Klein.

And, finally, that they recuse themselves because of the unconstitutionality

of their appointments.

The temporary panel denied the motions without citing law, logic or factual bases for their decision:

> "It is hereby ordered that the motions of respondent herein be and the same are hereby denied in their entirety." (Order of temporary panel dated May 6, 1974.)

They did, however, disclaim "personal interest, prejudice or bias whatsoever against any or all of the parties herein" without affirmation or facts to support their assertion and intentionally made no disclosures whatsoever about their personal involvements with the regular court, the defendants or their attorneys. It is interesting that they did not disclaim favoritism or involvement for and with the appellants below, examples of which are listed in Addendum I to the Petition for Rehearing.

On the 7th of May, 1974, affidavits of prejudice against each individual member of the panel were filed and ignored by them. The main thrust of the affidavits relates to due process and equal rights under the Federal Con-

stitution:

> ". . . The members of said temporary Supreme Court . . . are disqualified jurisdictionally and ethically from sitting . . . and . . . that because of secret procedures in their selection, bias, conflict of interest and prejudice against your affiant . . . (he) cannot have a fair and impartial hearing on said appeal . . . Your Affiant will be deprived of his civil rights including, but not limited to, the right to due process and equal protection under the law and be further deprived of the rights and privileges secured to other citizens of this state . . . as the same are enshrined in the United States Constitution . . . "

Motions to dismiss the appeal and compel the defendant-appellants below to abide by the Minnesota Rules of Civil Appellate Procedure were filed without prejudice to the constitutionality of Chapter 18 or other constitutional issues and were summarily denied by the panel on May 21, 1974. The issues of constitutional waiver were presented as part of this motion. The panel was fully informed of the facts available relative to the Amherst Wilder-First

National Bank-St. Paul Insurance Companies intentional involvement with the Minnesota Supreme Court. (See Section (e) below and motions to dismiss before the temporary panel for details of these interrelationships.)

The oral argument disclosed a temporary panel completely unprepared and obviously primed to "help" the Amherst Wilder Foundation; the questioning was non-existent on material matters and otherwise prejudicial and immaterial to the issues. (See Transcript.)

Because of the refusal of the Supreme Court to disclose its procedures on this appeal, vis. a vis. Chapter 18, prior to submission to the temporary panel, a letter was addressed to McCarthy relative to procedures and law to be followed after submission.

"Chief Judge" Rosengren of the panel clearly established his prejudice by a reply in which he labeled the letter "personally impertinent" and was "IMPELLED ALSO TO SAY THAT IF HE (Dr. Wild) DOES NOT LIKE OUR JUDICIAL SYSTEM, . . . THAT AT THE CONCLUSION OF THIS LITIGATION HE RETURN TO ENGLAND WHERE

HE MAY ENJOY THEIR CUSTOMS MORE THAN HE APPARENTLY LIKES OURS." (Emphasis supplied.)

The constitutional deficiencies of the decision were treated in detail in appellant's (here) petition for rehearing. See especially pages 63 to 80.

See esp. at p. 64:

> "Without citing a single instance of misconduct, this panel reduced a long, complex and highly significant matter to five sentences of meaningless subjective terms without a definitive fact, a logical relationship or a supporting legal authority . . .
>
> . . . By ignoring uncontested evidence, reasonable inferences therefrom, unrefuted citations of established law and reasoning contained in cited opinions, the temporary Supreme Court in effect not only deprived Dr. Wild of equal rights under law, but in reality gave him no hearing at all on the appeal. The Opinion cannot be condemned excessively as it makes a corrupt sham of the judicial appellate process in Minnesota. It makes Dr. Wild's resort to law as a person wronged to the point of

> personal destruction, an exercise in futility. The panel's opinion standing alone is proof of constitutional deprivation . . . "

The "panel" waited nearly four months and issued a one-sentence order, again without facts, reasoning, logic or law in support:

> "It is hereby ordered that respondent's petition for rehearing in the above entitled matter be and hereby is, in all respects, denied." (See Order filed August 6, 1975.)

In an attempt to clarify these issues prior to submitting thepetition for rehearing, a motion was submitted (without prejudice to the constitutional issues involved), to the permanent court on January 20, 1975, which, among other things, asked the regularly constituted Minnesota Supreme Court to adopt or reject the orders, findings and actions of the temporary panel. (See Motion dated 1-20-75; letters of March 7, 1975, Wild and Williams to McCarthy; letter of 2-20-75, McCarthy to Williams with enclosures.) The permanent court refused to do this prior to the petition, (see Order of March 21, 1975), but when

the motion was renewed (see Motion dated August 15, 1975), the court adopted the panel's orders, actions and findings as its own and finally admitted (see Memorandum, page 2 of Order), that Judge Otis, a Vice President of the defendant (appellee here) foundations participated in the selection of the panel.

Chief Judge Sheran persists, however, to this day in refusing to divulge who wrote the panel's decision, who chose whom, whose idea it was to use senior or chief or other district judges, or when the appointing decision was made.

The economic disparity concept as a matter of United States Constitutional due process and/or equal protection was raised in the motion and rejected by the Minnesota Court: (See Order dated October 16, 1975; Motion dated August 15, 1975, paragraph 14; and, pages 65-66 of Petition for Rehearing.)

> ". . . relief requested . . . be and hereby is denied . . ."

> ". . . this matter is remanded to the District Court of Hennepin County for further procee-

dings consistent with the Opinion of the Minnesota Supreme Court filed on the 17th day of January, 1975."

All other corollary issues listed herein and not previously discussed in this section are raised in the Petition for Rehearing and Motion for Recusation and the Motions for Dismissal of the Appeal. They were summarily rejected or denied without comment by both the temporary panel and the permanent court (even after disqualification.) See citations supra.

THE FOLLOWING IS A CONCISE STATEMENT OF CASE CONTAINING FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED:

The defendant-appellee foundations control a substantial portion of the St. Paul Companies (a billion-dollar insurance complex and major underwriter of medical malpractice insurance with its home office in St. Paul, Minnesota), and have a Minnesota Supreme Court Judge as an officer and board member. The remaining members of the Minnesota Supreme Court (apparently acting or permanent) are "visitors" (protectors of assets) of the appellee Amherst H. Wilder Foundation. (Other board members of Wilder Foundation are equally influential and "establishment", e.g., the First National Bank cartel, the St. Paul Companies, a large law firm, 3M Company.) While the permanent supreme court has, by implication, denied that this "visitor" responsibility means anything, Amherst H. Wilder Foundation has never lost an appeal to the Minnesota court nor has any member of the Supreme Court of Minnesota or their temporary replacements ever renounced or repudiated their responsibilities as visitors to protect the defendant-appellees' assets. It is a small wonder that shortly after a verdict was returned and judgment entered against Wilder Foundation (of over 16-million dollars), the foundation printed without qualification or contingency in its certified annual accounting, with the unabashed hauteur of the all-powerful, that the judgment would be set aside. (See Statement, Wilder Foundation Annual Report, Fiscal 1972-1973.)

It was this same pervasive force that had destroyed Dr. Wild's career

as a brilliant medical research scientist and decimated his monumental interdisciplinary cancer research project. These acts, which gave rise to the trial below, were committed with such vicious malice that even the foundations' trial counsel was forced to concede the destruction, its inhumanity and malice. (See Resp. Supp. Record, pp. 199-200.)

At the conclusion of six weeks' testimony, the jury responded to the evidence by granting 11-million dollars in punitive damages (10% of the foundation assets) and over 5-million dollars in compensatory damages, THE LARGEST PERSONAL AWARD IN THE HISTORY OF LAW.

The power of the defendant-appellee foundations, their business and judicial connections, associates and their large law firms, was so deeply entrenched that to date, no settlement of any nature has been profferred by the defendant-appellees.

Acts of special privilege corruption of the appellate process in Minnesota, in this case, by these unscrupulous and morally unprincipled officer

and judicial visitors of the defendant-appellee foundations, provide the factual material necessary to the consideration of the questions presented. No rational being will deny that responsible use of wealth and power has contributed to make America great. But the Constitution was designed by the Founding Fathers to restrain abuse. This case is a classic example of the misuse and abuse of both wealth and power. There is evidence that the same pervasive power reaches into the executive and, in this case, judicial branches of the federal government. (See esp., United States District Court, 4th Division District of Minnesota, File No. 4-73 Civ. 473, and 8th Circuit Court of Appeals, File No. 73-1137.)

Dr. Wild, a naturalized American citizen, was unaware of the extent of the defendant-appellees influence and animosity until he attempted to get sponsors for his federally-funded research following the Amherst Wilder and Minnesota Foundations precipitate withdrawal of their sponsorship. The

foundations, incredibly, denied this world-eminent scientist access to his research facility while they dismantled and destroyed his unique disciplinary scientific laboratory and malevolently prevented its reconstruction and also prevented the project's continuation under other sponsorship. (See Resp. Supp. Record, pp. 1-200 and Resp. Brief, pp. 7-29.)

In consonance with his other professional medical duties, Dr. Wild appeared as an expert witness in medical malpractice cases during the six-year period before his case came to trial. (N.B. In a jurisdiction where two years is the average trial delay.)

While the instant case was being subjected to delay after delay by defendants' counsel, a malpractice suit (Mulder v. Parke Davis, et al, [1970], 288 Minn. 332, 181 N.W. 2d 882) in which Dr. Wild appeared as an expert witness and in which the St. Paul Companies were interested, was appealed to the Minnesota Supreme Court.

Judge Otis, Vice President and board member of the defendant-appell-

ee foundations, wrote the opinion.

Judge Otis personally owns a substantial block of stock in the interested insurance company (St. Paul Companies).

Judge Otis voted St. Paul Companies stock in conjunction with his fellow foundation board members having a market value at the time of trial of over 60-million dollars. (The defendant-appellee foundations own a substantial portion of the outstanding stock of the St. Paul Companies, amounting to hundreds of thousands of shares and effective control.)

The St. Paul Companies have a substantial monopoly of malpractice insurance in Minnesota as well as in other states.

Judge Otis' colleagues on the Minnesota Supreme Court are trustees (visitors) of the Amherst Wilder Foundation, responsible for the protection and maintenance of the foundations' assets (which assets include the St. Paul Companies' stock holdings).

In writing the opinion referred to above (i.e., Mulder v. Parke Davis, et

al), Judge Otis, individually and on behalf of his fellow supreme court judges, took unethical and criminal advantage of his high judicial position. (see Minnesota Statutes 609.43 making it a crime to use a public position to injure another.)

The entire permanent Minnesota Supreme Court, speaking through Judge Otis, libeled Dr. Wild professionally. (See motions for disqualification and recusation, filed March 12, 1973.)

The purpose and result of this act was to serve the financial interests of the St. Paul Companies and the defendant (appellee here) Amherst Wilder Foundation.

Dr. Wild was discredited as an expert witness to protect the assets of the St. Paul Companies, both as to liability for malpractice claims and, also, as to Dr. Wild's personal suit against the Amherst Wilder Foundation.

The St. Paul Companies carry million-dollar policies protecting the defendant-appellee foundations in this appeal.

The State Judicial Responsibility

Committee, led by then Chief Judge Knutson, refused to act when these facts were brought to its attention. Said committee included Minnesota District Court Judges Preece, Fosseen and Odden who were later appointed to the temporary panel to decide this appeal.

Judge Otis apparently committed multiple acts of perjury while testifying during the trial in the instant case in an effort to cover up his illegal activities on behalf of the St. Paul Companies and the defendants (appellees here). (See Transcript, pp. 3281 to 3306 and Resp. Supp. Record, SR128 to SR141.)

Therefore, when Amherst Wilder appealed the 16-million dollar judgment against itself (and, by implication, against its insuror, St. Paul Companies), to its own trustees, the Minnesota Supreme Court - in effect appealing to itself - Dr. Wild filed affidavits of prejudice. The Amherst Wilder visitors, i.e., the Minnesota Supreme Court, refused to accept the affidavits of prejudice or even to file them. The plaintiff (appellant here)

then prepared and filed motions for recusation. In the meantime, the Supreme Court sponsored and lobbied a special act through both houses of the legislature in a matter of days. The legislature was told by the Minnesota Supreme Court, through its Chief Administrator, that it was only being asked to pass a law which would reestablish an old constitutional provision as law in the event of multiple disqualification on the supreme court. (See Transcript of Proceedings before Minnesota Senate Sub-committee on Judicial Administration, Feb. 2, 1973.) This was a fraud and a criminal corruption of the legislative process. IN TRUTH AND FACT, WHAT THE COURT WAS DOING WAS GETTING AUTHORITY SO THAT THE JUSTICES COULD DISQUALIFY THEMSELVES YET CONTROL THE APPEAL BY APPOINTING THEIR OWN REPLACEMENTS AND THEREBY AVOID DIRECT PUBLIC RESPONSIBILITY FOR WHAT WAS OBVIOUSLY A PREDETERMINED DECISION ON APPEAL! The old constitutional provisions, which the court misrepresented to the legislature, in reality provided for the GOVERNOR or, in the event of his dis-

qualification, the LT. GOVERNOR, to appoint temporary replacements to the court. (See Article VI, Sect. 3, Minnesota Constitution as amended, 1876.) The covert purpose of ramming through this legislation, in addition to avoiding public exposure, was to avoid losing absolute control of the appeal. The law enabled the court to select its replacements to guarantee the highest degree of partiality, not the highest degree of impartiality as constitutionally required. Also, it will become evident that the granting of a new trial with tailor-made strictures on the plaintiff (appellant here) was a technique of controlling and pre-determining the outcome of the new trial in favor of the Amherst Wilder Foundation.

The court then purportedly disqualified itself en banc. The court did not act on the specific motions for recusation nor did it publicly reveal WHY the entire supreme court was disqualified.

The purportedly disqualified regular court refused to disclose the procedure that would be followed in the

appeal or in the selection of the panel. (See correspondence cited supra.) The panel itself was not named until shortly before the arguments (April 10, 1974). Following the appointment of the panel, it was determined that the court-selected companion panel was just as prejudiced as the regular court which had been forced to disqualify itself. For example, chief substitute Judge Rosgren, who probably wrote the "Per Curiam" opnion, may well have continuing financial interest in the St. Paul Companies through the law firm he headed before his appointment to the bench and wherein he represented the St. Paul Companies. Judge Rosengren and at least two other members of the court-selected companion panel were formerly acting associate justices on the supreme court, acting generally in agreement with the disqualified court. They worked in close association with Judge Otis during the time the Mulder, supra, case was decided. The current regular Chief Justice Sheran participated in the Mulder, supra, case and, like Rosengren, may well have continuing financial and personal int-

erest in the St. Paul Companies as a senior partner of the St. Paul Companies Mankato, Minnesota, law firm prior to initially going to the court. Further evidence of prejudice and partiality of the temporary panel can be found in the appendix to respondent's (appellant herein) petition for rehearing, the petition itself, Dr. Wild's affidavit of October, 1972, and the temporary panel's opinion.

Chief Judge Rosengren crudely displayed the temporary panel's disdain for constitutional due process and equal protection by suggesting in a letter to Dr. Wild's attorney, written during the deliberations, that if Wild didn't like the way law was administered in this country, he should go back to England! Judge Rosengren also accused Dr. Wild's lawyer of being "impertinent" for simply making inquiry as to the procedures to be followed in this extraordinary appeal, and accused Dr. Wild of being the originator of this "impertinence"! (See letter dated July 5, 1974, Rosengren to Williams.)

The regular supreme court ruled

on important motions (e.g., Motion to Dismiss Appeal dated August 20, 1973, Denied by disqualified court on August 27, 1973, without reasoning, law or comment), even after it had disqualified itself. The long delay in announcing the selection of the substitute panel until shortly before the arguments prevented Dr. Wild from adequately determining the qualifications of the individuals selected by the disqualified court. (See Order of Chief Judge Sheran dated April 10, 1974 - contrast Notice of Disqualification dated March 12, 1973, over a year's delay.) The panel refused to submit to voir dire and volunteered no information whatsoever that would bear on their qualifications to serve.

The substitute panel denied all motions, including the constitutional issues, without comment, reasoning or legal authority; refused to compel the large law firm representing Wilder Foundation to abide by appellate rules; ignored affidavits of prejudice filed against them, and asked no material questions at oral argument. (NO quest-

ions whatsoever were asked on "misconduct", the panel's pretended cause for reversal.)

The temporary companion court's decision in professional essentials was a sophomoric subterfuge at best -- criminal and irresponsible at worst. (See esp. Petition for Rehearing, April 15, 1975.) The conspiracy to deprive Dr. Wild of his priceless constitutional rights to due process and equal protection and to destroy his substantial money judgment was complete (just as the defendants [appellees here] and their judges had destroyed his substantial professional standing [i.e., see Mulder opinion, supra,] and research project earlier.)

The defendant-appellee foundations' continuing control of the appellate process in Minnesota creates an infinite plane (mobius strip) of never-ending litigation. They have the power to prolong the litigation until Dr. Wild's death (see panel's decision, Appendix A here, esp. Ft. Nt. 17 re: survival of causes of action after death); in effect, delaying justice forever.

(e) The federal questions presented are substantial.

There is no more fundamental tenet of our constitutional government than that justice shall be administered in accordance with established principles and not at the whim, caprice, or personal notions of justice held by individuals exercising the power of the state. The integrity of the judicial process is the very foundation of the constitutional rights guaranteed in the 14th Amendment. It is almost inconceivable that a more substantial federal question could be submitted to this court.

The paucity of material in the field of civil appellate due process and equal protection is evident in researching the cases, reviewing the literature and discussing the issue with constitutional scholars.

The very dearth of decisions and scholastic analysis indicates the need for long-overdue, clear, concise enunciation of constitutional principles involving due process and equal protection in civil appeals.

While this court has decided hun-

dreds of cases involving constitutional standards of criminal law in recent years, showing great compassion and zealousness to protect the constitutional rights of rapists, murderers and child molesters, an imbalance in output concerning the civil rights of the law-abiding, the poor and those lacking in special influence seems to exist. A government of laws must have at least equal concern for both criminal and civil due process. Clear constitutional standards and principles are the only weapons to protect us from the irrational and inhuman predacity of the rich, powerful and influential who consider themselves judge-makers. Men who cynically disregard the rights of others and subject the common man to specially-created law for the protection of their own interests endanger the very foundation of civilization. When law is a mere implement serving the interests of the privileged few, equality, according to the cherished precepts of our American Republic enunciated in the Constitution, is a mockery.

The appellate tribunal is not a House of Lords but must be an inherently democratic institution adhering to reasonable standards (due process and equal protection) of impartiality, reaching its decisions in a dispassionate atmosphere of applying established law and professional legal standards. (A judge cannot judge his own case; see U. S. v. United Mine Workers, supra.)

To substantially reduce the requirement of a reasoned opinion publicly applying established law to established fact, resurrects the scourge of the Dark Age Inquisition - the "Star Chamber", and allows secret reasons arrived at outside regular judicial process. The law and the judicial system are delivered by order to the market place of the privileged. The back door becomes the courtroom; the court proceedings - cheap, hypocritical charades. Justice can become whatever one wants and has the wealth to purchase.

The standards of equal protection and due process we seek are absolute necessities for the man of today. We should be regularly reminded that mod-

ern man is only slightly removed from the untold thousands of generations who knew nothing but naked power and survival of the fittest without law of any kind.

Law is a noble but, nevertheless, young, frail and delicate concept in a universe of endless destruction. It must be treated with care.

Appellate judges must abide by the same constitutional principles that apply to trial judges and juries if the system is to work.

THE CASE IS OF SUCH IMPORTANCE THAT IT REQUIRES PLENARY CONSIDERATION.

The spirit of Watergate and its near destruction of what little remained of public confidence in the legal profession and the judicial process still pervades the land. The echoes of Watergate will not be stilled unless an unequivocal procedure incorporating principles of due process and equal protection are enunciated and effected. The John Wild, M. D., case can be another Dred-Scott decision or it can be a beginning of bringing the concept of "equality" into reality in

the realm of civil law.

The law must not fail to cast aside the special privilege control of the judiciary in Minnesota as a resounding precedent and a warning to judicial corruption in other jurisdictions.

All the necessary ingredients for reaffirming the concepts of traditional American fair play are present in Dr. Wild's case.

The prevalence of the belief that large law firms, acting for their powerfully rich clients, control appellate judges is overwhelming. Wild v. Rarig, et al, stands in stark support of that proposition. (See Decision, Appeal to 8th Circuit herein - there the court refused to even issue an opinion, a case of gross perversion of legal process. Consider also the license to ignore the Minnesota Rules of Civil Appellate Procedure granted by the panel to the foundations' large law firm and the substitute panel's decision itself; see Motions of May 14, 1974 and April 19, 1974.)

This, then, is not simply discrimination against Dr. Wild, an English

immigrant devoted to free research, and special favor for Amherst Wilder, St. Paul Companies and their associates; but the general corrosion of judicial fairness where the interests represented by the independent lawyer are discriminated against and special laws, special rules and special decisions are rendered to the order of the large special interests and their corporate law firms.

In a rare moment of candor, the Minnesota Supreme Court, speaking through its lawyers, admitted by implication that they considered due process and equal protection in appellate proceedings not substantial questions (see proceedings before U. S. District Court and 8th Circuit.) Thus, the bizarre disregard of their constitutional responsibilities in the Wild case by the Minnesota Supreme Court and its companion panel is overwhelming evidence that they practice what they preach.

In summary, the enactment, substance and application of the statute (Official Edition, Minnesota Statutes, 1974, Volume I, p. 50, also cited as

Laws, 1973, Chapt. 18, ss. 2, Governor Approval, March 9, 1973, also known as Minnesota Statutes Annotated 2.724, Subd. 2.) constitute an unconstitutional discrimination against Dr. Wild and a violation of his civil rights in that the law was used as a vehicle to deny him:

(1) A fair and impartial hearing;

(2) Reasonable findings of fact and law expressed with reasonable cogency and logic in an understandable opinion;

(3) The right to the application of established principles of law fairly by impartial appellate judges;

(4) The right to be free of unconstitutional interference with jury trial; and,

(5) The right to speedy justice (and a corollary condemnation of Dr. Wild to perpetual litigation until his death).

Underlying this entire appeal are the key subsidiary questions:

(1) Is an arbitrary, capricious, unprofessionally prejudiced appellate

function depriving a citizen of his "jury right" (i.e., effectively taking away his <u>right</u> to a fair trial) constitutionally allowable?

(2) At what point, if at all, does the economic disparity of the parties in civil cases, limit (as a matter of constitutional right to due process and equal protection) the rights of appellate courts to grant new trials, where such action is tantamount to a permanent deprivation of property?

The granting of a new trial <u>contrary to law and fact</u> by the "puppet" or "companion panel" is tantamount to a final and complete destruction of Dr. Wild's remedy, for what reasonable standards of integrity and fair treatment can be extended in this case if the acts of defendants (appellees here), their counsel and the Minnesota temporary and permanent Supreme Courts are upheld? Dr. Wild can now never have a fair hearing in Minnesota. The defendant-appellees have wilfully precluded this. <u>Therefore, the only fair solution</u> is to set aside the panel's unlawful decision and order reinstatement of the verdict

or order the appointment of an impartial panel for total reconsideration.

The statute (upon which this appeal is founded), its enactment and approval provide the framework of this entire inordinate perversion of due process and equal protection.

Some of the extensive personal and professional misconduct of the temporary panel is listed in Addendum I to the Petition for Rehearing.

The undue influence of Amherst Wilder Foundation and the St. Paul Companies amounts to a corruption of the appellate process.

At no time did either the temporary panel or the regular court disavow their foundation-trustee allegiance to the defendants (appellees here) Amherst Wilder Foundation and the Minnesota Foundation. Judge Otis admitted during examination at trial that he would go outside normal legal channels when it "effects my fiduciary", i.e., the foundations. (A criminal act in Minnesota-Minnesota Statutes Annotated 609.515 - to go outside regular course of proc-

eeding.) He further stated that he considered Dr. Wild had sued him personally when the Doctor sued his "fiduciary", i.e., the foundations.

At the hearing, the temporary panel asked a question on the issue of Wilder Foundation's responsibility for the acts of other defendants (appellees here) that had been conceded at the trial by the defendant and WAS NOT raised on appeal! (See transcript of Arguments before panel.) The perverse prejudice was demonstrated further in the opinion by the raising of the conceded issue again! (See Ft.Nt.5, esp. Ft. Nt. 15, panel's decision, Appendix A here. Obviously, done in a prejudiced attempt to preserve Amherst Wilder's assets, i.e., exercising their responsibility as "visitor-trustees" of Wilder, hardly surprising as they are deciding their own appeal!)

As Judge Otis admitted (vide supra) special treatment is granted for Amherst Wilder. There was no censure for the Mulder, supra, libel, and three supreme court panel judges participa-

ted in that early refusal to rectify improper conduct. (These same three judges, predictably, decided this case in favor of Amherst Wilder and St. Paul Insurance Companies.)

Finally, can an appellate court deprive this plaintiff-appellant of a 19-million dollar verdict and judgment without reasonable standards or can secret bases for the decision arrived at outside the regular course of legal proceedings constitute due process?

This court must enunciate standards to be followed by appellate courts throughout the land.

"Watergate-type" morality must be rejected in the administration of justice by the United States Supreme Court.

A refusal to act and rectify this judicial impropriety will be a repudiation of the traditional American ideal of fair play and the reestablishment of the dominion of raw power. The highest court of the land will, in effect, embrace and legitimize corruption and prejudgment as the law of the land. The victory will not just go to the sycophants and special influence peddlers

in Minnesota but will go equally to all those manipulators throughout the land who would trade our federal constitutional heritage for a "mess of financial pottage".

This simple truth cannot - must not - be ignored: <u>That the civil rights of this appellant have been destroyed by a corrupt conspiracy of judges, influential legal, insurance and banking interests and a criminally perverted legislative process</u>.

The Constitution is sacred to each of you. Your oath of office affirms your duty. As Doctor Wild stated in his letter to the Minnesota Supreme Court on March 10, 1975:

> ". . . Rules of Civil Appellate Procedure (and law) must be adhered to in order to sustain and develop civil order; the alternative is chaos. Orderly appellate procedure must be followed so that decisions can be made and legal documents prepared according to procedural and substantive law. Failure of the judicial branch of state government to abide fully by these rules and differential selection of those rules to be applied

from the start of the appeal have deprived me of my constitutional rights to due process and equal treatment before the law and, in that regard, I have recently had occasion to review, at the suggestion of my attorney, in response to my searching inquiry as to the legal meaning of my constitutional rights to equal protection and due process, the brilliant reasoning of the United States Supreme Court in Cooper v. Aaron (1958) 358 U.S. 1, as presented in "The Bill of Rights Reader", Cornell University Press (1974) by Prof. Milton R. Konvitz. Chief Justice Warren, as you know, stated on behalf of the court, that the 14th Amendment 'commands' that NO STATE AGENCY, whether it be legislative, executive or judicial, deny to any person within its jurisdiction the equal protection of the laws.

"It is now clear that litigation involving the Amherst Wilder Foundation, a multi-million dollar, private Minnesota corporation, and its affiliates, inevitably causes breakdown of established governmental procedures applicable to the judicial branch of state government because of the involvement of the state supreme court and other state officials with this

private corporation.

"Attempts by the Supreme Court of Minnesota to circumvent the problem have resulted in illegitimate improvisation of appellate procedure and to improprietous, arbitrary and capricious solutions, in contravention of constitutional guarantees of due process . . . "

Recently, Dr. Wild summarized the transcending importance of this appeal:

"Failure to fully, fairly and completely review and rectify this odious situation would at best be a tacit approval by the highest guardians of our constitutional rights, of dishonesty, discrimination in appellate proceedings and a callous disregard of civil appellate due process -- at worst, a wilfull participation in a heinous criminal conspiracy to deprive me of my civil rights."

The United States Supreme Court must decide if America's ideals of fair play and equal rights before law apply to the poor of this country or if the court system is the private hunting preserve of the rich where the poor are mere poachers who can be figuratively shot down for having the audacity to

trespass; a system wherein the merits of the poor man's cause are always mere trivia and the magnitude of the injustice that may have been committed against him is invariably insignificant.

A President of these United States once stated the essential principle of due process and equal protection as follows:

> "Through compassion for the plight of one individual government fulfills its purpose as the servant of all the people."

Respectfully submitted,

JAMES MALCOLM WILLIAMS
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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-921

JOHN J. WILD, M. D.,

Appellant,

vs.

FRANK M. RARIG, MINNESOTA FOUNDATION, a Minnesota nonprofit corporation, and AMHERST H. WILDER FOUNDATION, a Minnesota nonprofit corporation,

Appellees.

APPENDIX
(TO JURISDICTIONAL STATEMENT)

JAMES MALCOLM WILLIAMS
Attorney for Appellant
212 West Franklin Avenue
Minneapolis, Minnesota 55404

APPENDIX A

No. 178 Hennepin County

Per Curiam
Concurring specially, Irvine, J., Odden, J., Johnson, J.

John J. Wild, M.D.,
Respondent,

44238 vs.

Frank M. Rarig, et al,
Appellants.

Endorsed Filed January 10,1975 John McCarthy, Clerk Minnesota Supreme Court

S Y L L A B U S

1. Where the prejudicial misconduct of plaintiff and counsel for both parties permeated the proceedings in the trial court and was of such serious and pervasive nature as to deny the litigants a fair trial, the trial court committed an abuse of discretion in denying defendants' motion for a new trial though defendants had failed to object to some of the incidents of misconduct and though the trial court had in other instances given cautionary instructions to the jury.

2. Though this court will not normally discuss other contentions of the parties after granting a new trial on

one ground, where the law governing the issues raised by the parties was unclear and the trial court would be called upon to rule upon these issues upon retrial, this court may exercise its discretion under Rules of Civil Appellate Procedure, Rule 103.04, and review a number of issues so as to avoid another appeal.

3. The admission of opinion testimony by plaintiff, a layman, that defendant had breached a contract allegedly existing between the parties was error, for the testimony went to an ultimate fact issue and invaded the provice of the jury.

4. Where plaintiff researcher and defendant foundation-administrator agreed at the time of application for a Public Health Service research grant that the expenditure of funds would be governed by Public Health Service policies and where the notification of grant award stated that the grantee was obligated to administer funds in accordance with Public Health Service policies, the trial court erred in excluding from evidence a 1963 Public Health Service Grants Manual which contained provisions governing termination of research projects by the grantee institution which provisions were relevant to the issue of the propriety of defendant's termination of plaintiff's research project, and in ruling that a contract was in existence and that the proffered exhibit would alter the terms of that contract, thereby improperly taking a fact issue from the jury.

5. Where evidence was not conclusive on the question of whether the relationship between plaintiff and defendant was that of employer-employee or independent contractors, the issue was for the jury, and an instruction that plaintiff was not an employee was erroneous.

6. Damages for breach of contract are limited to the actual damages flowing from the breach unless the breach constitutes, or is accompanied by, an independent tort, and a plaintiff is not entitled to recover a tort measure of damages for the malicious breach of an implied covenant of good faith.

7. Though the tort of wrongful interference with business relationships as a property tort is generally included in Minn. St. 541.05, the 6-year statute of limitat-

ions, rather than Minn. St. 541.07, the 2-year statute of limitations, where the cause of action for interference with business relationships arises out of defendant's defamation of the plaintiff, the 2-year statute of limitations applicable to the defamation claim will be applied to the interference-with-business-relations claim as well.

8. Where a fact question existed as to whether defendants had fraudulently concealed a continuing conspiracy to defame the plaintiff, the trial court upon retrial should apply to the facts the general rule that fraudulent concealment, consisting of an affirmative statement or act which is designed to and does prevent discovery of a cause of action, will toll the statute of limitations either until discovery of the existence of the cause of action or until reasonable opportunity for discovery by the exercise of ordinary diligence.

9. Deposition of an out-of-state resident containing assertions that another person unavailable to testify had attended a meeting of a hospital research committee at which defendant Rarig made disparaging remarks about plaintiff, which remarks all-

egedly formed the basis for the hospital's refusal to sponsor plaintiff's research project, was hearsay and not within an exception to the hearsay rule and thus its admission, if permitted for use as substantive evidence, was erroneous.

10. By placing into evidence the deposition of a person who was unavailable to testify, plaintiff made the deponent his witness under Rules of Civil Procedure, Rule 26.06, and thus admission of plaintiff's impeachment evidence showing prior inconsistent statements by deponent was improper as plaintiff was not genuinely surprised.

11. A letter written by three members of plaintiff's scientific staff criticizing plaintiff's competence as director of the staff was properly excluded as hearsay and was not admissible as a business record under Minn. St. 600.02, as it is not the type of record entry which is regularly and systematically kept and, therefore, likely to be reasonably trustworthy.

12. A witness' testimony as to statements made by a person now deceased which in turn related comments allegedly made by a member of a foundation board concerning

the reasons for the foundation's termination of plaintiff's research project was double hearsay, did not come within an exception to the hearsay rule, and thus was improperly admitted as substantive evidence.

13. Where a witness testified that he had no recollection of a 1963 telephone conversation regarding plaintiff with a Minneapolis attorney, now deceased, testimony of a person present in the office of the deceased attorney at the time of the alleged conversation recounting the deceased attorney's summary of the conversation was improperly admitted as impeachment evidence, as no foundation was laid to establish the identity of the person on the other end of the telephone conversation.

Reversed and remanded for new trial with directions.

Considered and decided by the court en banc.*

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*The following Judges of the District Court acted herein as Justices of the Supreme Court pursuant to Minn.Const. art. 6, § 2, and Minn. St. 2.724, subd.2: Judge Robert J. Breunig, Judge Glenn E. Kelley, Judge Rolf Fosseen, Judge L. J. Irvine, Judge Donald C. Odden, Judge Chester G. Rosengren, Judge C. A. Rolloff, Judge James E. Preece, and Judge William T. Johnson.

O P I N I O N

PER CURIAM.

This is an appeal from a judgment and from an order denying a new trial. We reverse and grant a new trial with directions.

On December 3, 1966, Dr. John J. Wild, a research scientist, commenced a multiple-count action seeking combined damages of $35,000,000 against Amherst H. Wilder Foundation and Minnesota Foundation, both Minnesota nonprofit corporations, and against Frank M. Rarig and Julian Baird. Frank Rarig was executive director and secretary and Julian Baird was president of each respective foundation. In essence, the complaint contended that Dr. Wild was developing ultrasonic techniques to detect cancer in women's breasts and that the defendants were liable for contract and tort damages allegedly resulting from the manner in which Minnesota Foundation, as the grantee institution, withdrew its sponsorship from a cancer research grant awarded by the United

States Public Health Service to Minnesota Foundation and Dr. Wild, who was the project's principal investigator.

Specifically, Dr. Wild contended that Minnesota Foundation had breached its contract with him by withdrawing sponsorship; that the defendants were negligent in handling the administration of the grant from the Public Health Service; that defendants unreasonably interfered with the administration of the grant by attacking the scientific and professional standing of Dr. Wild as principal investigator of the project, by attempting to interfere with his laboratory staff, and, finally, by attempting to destroy the cancer project and Dr. Wild's scientific reputation; that in the process the defendants interfered with Dr. Wild's prospective business and professional advantages; that the defendants had defamed Dr. Wild in communications to the Public Health Service, Mount Sinai Hospital, and others; and that punitive damages were called for because of defendants' malicious behavior.

On January 4, 1967, the defendants individually answered the complaint, denying liability and pleading as an affir-

mative defense to the tort claims the 2-year statute of limitations found in Minn. St. 541.07.

On October 16, 1972, the case came to trial before a jury in Hennepin County District Court. At the close of the case, the parties' motions for directed verdict were denied, but defendant Baird was dismissed from the case. [1] Final arguments and instructions were given on Monday, November 27, 1972. The trial court submitted to the jury four causes of action: (1) Breach of contract, (2) bad-faith termination of contract, (3) interference with contract and professional business relationships, and (4) defamation of plaintiff. The negligence cause of action was not submitted to the jury. The court instructed as a matter of law that Dr. Wild was not an employee of Minnesota Foundation and that both foundations were liable for the acts of their agent, Rarig.

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[1] The trial was acrimonious and protracted, consisting of 24 trial days, 300 to 400 exhibits, 16 witnesses, 2 depositions, and a transcript which totaled approximately 3,700 pages.

On December 6, 1972, the trial court signed its order for judgment, pursuant to the jury's special verdict, against defendants Rarig, Minnesota Foundation and Wilder Foundation, in the cumulative amount of $16,277,300, of which $5,452,300 was for compensatory damages and $10,825,000 was for punitive damages.[2] The defendants' motions

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[2] The special verdict form read as follows: "We the jury in the above-entitled action find as follows:

"1. There was a contract between the defendants and the plaintiff.

"2. There was a breach of said contract by the defendants.

"3. We award plaintiff the sum of 129,000 dollars for said breach of contract.

"4. We find that the contract was terminated by the defendants in bad faith.

"5. We award the plaintiff 1,323,300 dollars for said bad faith termination of the contract.

"6. We award the plaintiff 825,000 dollars as punitive damages for said bad faith termination of the contract.

"7. We find that the defendants did interfere with the then existing contract and professional business relationship of plaintiff following termination of the project.

for judgment notwithstanding the special verdict and for amended findings or, in the alternative, for a new trial were denied on January 19, 1973. After judgment was entered and filed, defendants appealed to this court. On March 12, 1973, the justices of the supreme court recused themselves because of possible conflicts of interest.[3] Subsequently, a tem-

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"8. We award the plaintiff 2,000,000 dollars for said interference.

"9. We award the plaintiff 5,000,000 dollars as punitive damages for said interference.

"10. We find that the defendants did defame the plaintiff.

"11. We award the plaintiff 2,000,000 dollars as damages therefor.

"12. We award the plaintiff 5,000,000 dollars as punitive damages for said defamation."

[3] One alleged conflict of interest concerned James C. Otis, Associate Justice of the Minnesota Supreme Court, and his membership on the board of directors of both foundations and his appearance as a witness in this case. Another alleged conflict of interest was that visitorial powers were conferred upon the justices of the supreme court by the various wills of the Amherst H. Wilder family, which allegedly allowed them to have some interest in Amherst H. Wilder Foundation.

porary body of nine district judges was appointed to sit on this case.[4]

Dr. Wild, a native of England and holder of numerous degrees from Cambridge, is licensed to practice medicine in England and in Minnesota, although most of his work has been in research. While in the British Armed Forces during World War II, he became interested in distention and paralysis of the bowel. In September 1946, Dr. Wild came to the University of Minnesota Medical School to continue his work on intestinal distention. Sometime in 1949, Dr. Wild claimed, he ascertained by research that ultrasound echoes or waves could

[4]The temporary panel of justices was appointed under Minn.St. 2.724, subd.2, which provides in pertinent part: "* * * Any number of justices may disqualify themselves from hearing and considering a case, in which event the supreme court may assign temporarily a retired justice of the supreme court or a district judge to hear and consider the case in place of each disqualified justice." The supreme court, in a statement, explained that with the exception of the Second Judicial District, in which the Wilder Foundation conducts its principal charitable activities, the chief judge (annually elected in each district by the judges of such district), or, if unable to serve, the senior judge in point of service, of each of the 10 judicial districts was selected.

measure the thickness of a bowel wall. From this determination, he began using ultrasound techniques as a clinical aid to cancer detection.

Dr. Wild asserted that from 1950 to July, 1960, with the assistance of numerous Public Health Service grants and with the aid of the University of Minnesota Medical School, the Department of Electrical Engineering of the University of Minnesota, and St. Barnabas Hospital as sponsors, he developed an "echograph", a machine with a scanning device that received impulses in much the same way as do radar and sonar pictures, which when properly manipulated translated on a cathode-ray tube (oscilloscope) the presence or absence of cancer in women's breasts. Dr. Wild claimed there is a definite difference between the ultrasonic echo or wave patterns of noncancerous and cancerous tissues. Assuming that early detection is the principal hope to cure cancer, his objective in using "echography" was to discover cancer without the use of surgical procedures and proposed an eventual plan to mass-produce the "echograph" and scan people for cancer throughout the world.

Dr. Wild's relationship with his three previous sponsors had been somewhat controver-

sial and when it became apparent that St. Barnabas Hospital would no longer sponsor his work, Dr. Wild appealed to the Family Foundation of St. Paul, Minnesota, who referred him to Frank Rarig, executive director and secretary of Minnesota Foundation and the Wilder Foundation.[5]

At a July 1960 meeting with Rarig, Dr. Wild explained that his objectives were to obtain a new sponsor for his interdisciplinary cancer research project in order to obtain

[5]The Wilder Foundation was organized as a nonprofit corporation with substantial assets in 1910 as the result of a merger of three corporations which were formed in the early 1900's by the wills of the Amherst H. Wilder family. In 1949 to overcome legal limitations imposed by the Wilder wills, the members of the board of directors of the Wilder Foundation incorporated Minnesota Foundation as a nonprofit corporation and became its first board of trustees. Prior to this, the articles of incorporation of the Wilder Foundation were amended, with court approval, to authorize it to arrange for the use of its services and facilities, including its administrative staff and other personnel, by any other nonprofit and charitable corporation. Pursuant to these legal arrangements, Minnesota Foundation had a contract with the Wilder Foundation for executive, management, and research services. Minnesota Foundation reimbursed the Wilder Foundation for all services received, since Wilder Foundation funds could not be used to finance or subsidize Minnesota Foundation.

Public Health Service funds and for someone to take responsibility for laboratory equipment then owned by governmental agencies. At this time, he also asserted that he had had difficulty in maintaining his authority under his prior grants with respect to noninterference by sponsors.[6] Later, Rarig, on behalf of Minnesota Foundation, and Dr. Wild signed two grant applications, which were subsequently rejected, asking the Public Health Service for a one-year cancer-research grant.

Sometime in the fall of 1960, an advisory committee, consisting of men professionally competent to judge or pass on the objective and methodology of the interdisciplinary research project, was appointed at the request of Minnesota Foundation, for which committee Dr. Wild had suggested various members. Sidney Colbert, a hardware executive, was selected as president of the committee. Later, Minnesota Foundation assumed responsibility from St. Barnabas Hospital for the laboratory equipment and collected $1,500 in contributions.

Dr. Wild testified as to the following: That in 1960 and 1961, he had a number of con-

[6]It is undisputed that Dr. Wild conversed only with Rarig and did not meet with any member of the Board of Trustees of Minnesota Foundation.

versations with Rarig about extending the length of the application to at least 5 or even 7 years; that he had reiterated to Rarig at these meetings that Minnesota Foundation would be responsible for the indirect costs of the project (the administrative and accounting expenses) and the fiscal accounting of the direct costs of the project (the scientific expenses) but that he would have complete freedom of determining the costs of research, equipment, and the payment of the staff; that he would take care of working hours, management, hiring, and firing of personnel; that he would have complete scientific command of the project; and that the advisory committee would represent Minnesota Foundation on the scientific conduct of the project. On November 2, 1960, and January 30, 1961, Rarig, on behalf of Minnesota Foundation, and Dr. Wild signed applications, which were subsequently rejected, requesting 5 years of funds from the Public Health Service.

Dr. Wild contends that his conversations with Rarig and the applications submitted to the Public Health Service created an oral sponsorship contract from which Minnesota Foundation could not withdraw sponsorship if the government granted financial aid.[7]

On January 4, 1962, Minnesota Foundation and Dr. Wild applied for a grant of $123,000 from the Public Health Service for a "Medico-Technological Research Unit" to investigate, among other things, ultrasonic techniques for detection of tissue abnormalities. This application, jointly prepared and executed by Dr. Wild and Rarig, on behalf of Minnesota Foundation, named Minnesota Foundation as grantee institution and Dr. Wild as principal investigator. It requested funds from February 1, 1962, to September 30, 1962, in addition to 6 years of support which could be obtained by renewal applications.

On July 23, 1962, Grant GM 10063-01 (the grant) was issued by the Public Health Service to Minnesota Foundation as the grantee institution and Dr. Wild as principal investigator. The notification and statement of grant award stated that the initial grant was for $147,205 for the period August 1, 1962, to July 31, 1963, and provided future support, if funds were appropriated, for 3 additional years. Minnesota

[7] All the grant applications, except the one ultimately accepted by the Public Health Service, were not offered or received in evidence. In light of Dr. Wild's contentions, they may be material to the issues.

Foundation was to handle the grant money and receive 10 percent, or $14,000, as indirect costs for administering the grant. The notification referred the reader for further information on specific details applicable to general policies on research grants to a booklet entitled "Grant and Award Programs of the Public Health Service, Volume I - Policy and Inforamtion Statement on Research Grants --1959." The manual was subsequently supplemented by a pamphlet entitled "Supplement to Policy and Information Statement on Research Grants (Volume I) Pertaining to Research Program-Project Grants and Research Center Grants."

A few days after the project officially began, August 1, 1962, Dr. Wild hired two people for the project staff. Rarig wrote a letter admonishing Dr. Wild for not having sought prior approval of the advisory committee or Minnesota Foundation. This early incident probably best illustrates the basic conflict which was to plague the research endeavor throughout its existence--whether Dr. Wild or Minnesota Foundation was in control of the project. The situation generally deteriorated in the early spring of 1963 into frequent confrontations between Dr. Wild and Minnesota Foundation, represented by Rarig, over salaries of the staff, hiring and

firing of personnel, purchases of equipment, working hours, vacation time, accounting procedures, expense accounts, staff dissension, and the advisory committee's role and Rarig's function on the project.

Sometime in May, 1963, a renewal application (GM 10063-02) was submitted to the Public Health Service.[8] However, on May 27, 1963, the advisory committee issued a statement endorsing Dr. Wild's performance in regard to the research project even though it had heard staff members of the project complain of Dr. Wild's allegedly less than efficient performance as a personnel and business administrator. In June, Sidney Colbert, chairman of the advisory committee, requested Rarig to leave and not attend future advisory committee meetings. Rarig, after continued visits with staff personnel, requested a meeting with Public Health Service to discuss the situation. At a July 17, 1973, meeting, Rarig gave Dr. Carl Brewer and Dr. Trygve Tuve, officials of the Public Health Service, a memorandum entitled "Evaluation of Dr. Wild's Direction and Management of Minnesota Foundation's

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[8] This renewal application was not offered or received in evidence. In light of the contentions of the parties, it may be material to the issues.

Medico-Technological Research Unit," which stated that Dr. Wild (1) was incompetent as an administrator; (2) had falsely certified payrolls; (3) had used improper purchasing procedures; (4) had his staff concealing facts and covering up for him; and (5) that for Minnesota Foundation to continue to sponsor Dr. Wild, the indirect costs must be increased to 20 percent so it could employ a full-time administrator to oversee the laboratory.[9]

When the Public Health Service delayed in acting on Rarig's request, Minnesota Foundation on July 31 informed it that sponsorship of Dr. Wild's cancer-research project would be terminated on September 15, 1963.[10] Later, Minne-

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[9]This memorandum was returned by the Public Health Service and was destroyed by Rarig at the request of the Minnesota Foundation. Defendants contend that Dr. Wild had knowledge of the existence of this memorandum from a blind copy letter dated August 9, 1963, the original sent from the Public Health Service to Rarig. After a series of circuitous events, Dr. Wild received a copy of the memorandum on April 24, 1968.

[10]Rarig gave the following reasons for Minnesota Foundation's termination: "A. He [Dr. Wild] did not recognize that ultimate control was vested in Minnesota Foundation as the grantee and sponsor. His concept apparently was that Minnesota Foundation was a bookkeeper to carry out his instructions. B. He was

sota Foundation acquiesced to an advisory committee request to continue the project until December 31, 1963, in order to allow Dr. Wild time to find a new sponsor.

During the remainder of 1963, many efforts were made by Dr. Wild and by some advisory committee members to obtain another sponsor for the project. In particular, Dr. Wild contacted the Research and Education Committee of Mount Sinai Hospital in Minneapolis, Minnesota. In response to a call from Mount Sinai, Rarig, in early November, appeared before the committee. The committee members present at that meeting included Dr. Francisco Grande, who was director of Jay Phillips Research Laboratory at Mount Sinai Hospital, and Dr. Alvin Schultz, the director of medicine and medical research at Mount Sinai Hospital, who testified that Rarig suggested that Mount Sinai take over the project. On December 9, a research meeting was held with Dr. Wild and Sidney Colbert. The same committee members were present as at the

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unable to maintain constructive relationships with the project employees. There were continuing and repeated instances of differences between him and the other employees leading to hostile attitudes and chaos. C. He was not responsible in accounting for his own time, and, D. His conduct of the project was not satisfactory to Minnesota Foundation."

November meeting except for the addition of Hyman Edelman, cochairman of the committee and later one of defendants' attorneys (withdrawing from that position when it became apparent he might be a witness.) Dr. Wild states he would not accept Mount Sinai's sponsorship unless he had complete control of the project, which Mount Sinai would not give since it took an active role in the administration of its grants. Mount Sinai subsequently disapproved sponsorship of Dr. Wild's project.

In the latter part of 1963, Rarig engaged in a phone conversation with Dr. Tuve and John Haje, both officials of the Public Health Service, on disposal of the project's laboratory equipment. After speaking with Rarig, these officials wrote a memorandum to the record of their conversations in which they stated that Rarig expressed a fear that Dr. Wild would either destroy or dispose of the laboratory equipment because "equipment used by Dr. Wild had been known to disappear at other places where Dr. Wild had worked." Rarig denied making this statement.

On December 29, 1963, Dr. Wild alleged he had made a scientific breakthrough on his cancer project-- an electronic meter which would instantaneously register the difference between

normal and abnormal tissues and thus make unnecessary hand calculations which until then had been required and could take hours. On December 31, 1963, the day the project ended, Dr. Wild gave a demonstration of his breakthrough and issued a prepared press release to the media. After a phone conversation with Dr. Rarig, Tuve of the Public Health Service wrote a memorandum to the record which quoted Rarig as stating that various people had concluded that Dr. Wild's breakthrough was "faked." Rarig also denied making this statement. Dr. Wild has indicated he did not receive a copy of this document or of the memorandum prepared by Dr. Tuve and Mr. Haje until shortly before this trial.

The laboratory doors were locked on December 31, 1963, and no one had access except on Rarig's authorization. By January 31, 1964, after an audit and inventory, the bulk of the laboratory equipment had been sent to the Public Health Service at Bethesda, Maryland.

After the project's termination, Dr. Wild worked as a hardware clerk and retrained himself as a treating physician. The record also indicates that Dr. Wild made many attempts to find a new sponsor for his project but with no results.

PREJUDICIAL MISCONDUCT

Defendants contend that Dr. Wild and his counsel were guilty of prejudicial misconduct, while Dr. Wild claims that defendants' counsel attempted to "bait" his counsel into misconduct, that few objections were made to his counsel's behavior, and there were few requests for curative instructions by either counsel.

The matter of granting a new trial for misconduct of counsel or prevailing party is governed by no fixed rules but rests almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion. Brecht v. Town of Bergen, 182 Minn.603, 235 N.W.528 (1931). If the trial court instructed the jury to disregard the improper remarks or arguments, a new trial will rarely be granted by this court. See, Hinman v. Gould,205 Minn.377, 286 N.W.364 (1939). The primary consideration in determining whether to grant a new trial is prejudice. Boland v. Morrill, 270 Minn.86, 132 N.W.2d 711 (1965). The general rules are well set out in Patton v. Minneapolis St.Ry.Co. 247 Minn.368, 375, 77 N.W. 2d 433,438, 58 A.L.R.2d 921,(1956) where this court stated:

> "Unless the misconduct is so flagrant as to require the trial court to act on its own motion [See, Magistad v. Potter, 277 Minn.570, 36 N.W.2d 400 (1949); Janicke v. Hilltop Farm Feed Co. 235 Minn. 135, 50 N.W.2d 84 (1951)], which is rarely the situation and is not the case here, in order to raise the claim of misconduct there must be an objection at the time of the alleged misconduct, or at the close of the argument when it has been taken down by the reporter, and before the jury retires; also a request for corrective action and the failure of the court to act. A party is not permitted to remain silent, gamble on the outcome, and, having lost, then for the first time claim misconduct in opposing counsel's argument." (Italics supplied.)

This court has kept in mind that some prejudicial statements were not objected to and that the trial court sustained the objections made to some of the others and, in some instances, gave a cautionary instruction to the jury. Nevertheless, a close scrutiny of the record leaves us with a firm conviction that the trial court should have acted on its own motion and granted a new trial and therefore erred in denying defendants a new trial. There is no need to chronicle the prejudicial misconduct of plaintiff and the prejudicial misconduct of counsel for both parties. The trial record is permeated by such personality conflicts, such obvious appeals to passion and

prejudice, and such rude, abusive, and unlawyerlike trial antics and tactics that no jury could arrive at an impartial verdict. It is this court's responsibility to grant a new trial where misconduct, whether of party or of counsel, viewed in light of the whole record, appears to be inexcusable and of such serious and prejudicial consequence as to deny the litigants a fair trial. Since the prejudicial misconduct cannot be isolated, a new trial is granted.

After a new trial is granted by this court, we normally will not discuss other contentions raised by the parties. However, in light of the fact that the trial court may again be called upon to rule and in view of the fact that much of the law on the disputed questions is unclear, we will review a number of the issues on the supposition that by so doing another appeal might be avoided. Rule 103.04, Rules of Civil Appellate Procedure;[11] Lind-

[11] Rule 103.04(2), Rules of Civil Appellate Procedure, provides: "On appeal from an order the Supreme Court may review any order affecting the order from which the appeal is taken and on appeal from a judgment may review any order involving the merits or affecting the judgment. It may review any other matter as the interests of justice may require."

strom v. Yellow Taxi Co. 298 Minn.224,214 N.W. 2d 672 (1974).

CONTRACT

Dr. Wild's contract contentions are ambiguous. He makes reference to both the alleged oral sponsorship contract and to the Public Health Service for his obligations and rights. Defendants claim their obligations and rights with respect to Dr. Wild and the Public Health Service are defined in the Public Health Service manuals. These contentions, coupled with the fact that we cannot discern upon which alleged contractual breach the jury awarded damages, make various trial court rulings extremely important. In order to provide proper guidance for the trial court on a new trial, we must consider these determinations.

The first ruling of the trial court to be considered is whether a witness may give his opinion as to whether there was a breach of contract. Dr. Wild, over numerous, strenuous objections,[12] and Frank Rarig, without object-

[12] Dr. Wild gave his opinion on breach of contract some 40 times, often over objection. Many of these opinions were cumulative and repetitive. The following is a typical example:

"Q And at any rate, Doctor, did Mr. Rarig, acting on behalf of the Defendant institutions at sometime during the course

ion, gave their opinions on what they concluded were alleged breaches of contract.

Defendants argue here that admission of Dr. Wild's opinion testimony on whether there was a breach of contract was error. Dr. Wild argues that his opinions on whether there was a breach of contract were properly received by the trial court because (1) the contract involved highly technical matters; (2) many of his opinions were received without objection; (3) Rarig, without objection, rendered his opinion on the contract breach; and (4) the jury clearly understood they were the triers of the facts in this case.

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of the project insert himself as secretary of the Advisory Committee?

"A Yes.

"Q And based on your agreement with Mr. Rarig acting for and on behalf of the Defendant institutions, was this a breach of the contract you entered into with the Defendant institutions?

"MR. HALLADAY: Objected to as calling for an opinion on legal matters.

"THE COURT: He may answer the question.

"A Yes."

Although this court's attitude has been liberal in regard to opinions of a witness (Jones v. Burgess, 124 Minn. 265, 144 N.W.954 [1914]; Licensed Retail Liquor Dealers Assn. v. Denton, 144 Minn. 81, 174 N.W. 526 [1919]), it was error in this case to permit witnesses to give their conclusions or their opinions as to what constitutes a breach of contract. Cf., Roehl v. Baasen, 8 Minn.9 (26) (1862); Cargill v. Thompson, 57 Minn.534, 59 N.W. 638 (1894); Peerless Machine Co. v. Gates, 61 Minn.124,63 N.W. 260 (1895); Phillips v. Menomonie Hydraulic-Press Brick Co., 109 Minn.55, 122 N.W.874 (1909); Kinshella v. Small, 137 Minn.406, 163 N.W. 744 (1917). See, also, McCormick, Evidence(2 2d.) §§ 11,12. The admission of these opinions, on an ultimate fact issue, would merely tell the jury what result to reach. There is a real and substantial danger that the jury will not examine the facts but accept the opinion evidence only. In Lewin v. Proehl, 211 Minn.265, 258, 300 N.W. 814, 816 (1941), this court in discussing a similar problem stated:

> "By assignment of error defendant objects strenuously to rulings admitting the conclusions of plaintiff as to the meaning of the conversation. Plaintiff did testify that he and defendant 'agreed' thus and so. That was objectionable because it stated plaintiff's conclusion

> or inference rather than the conversational facts upon which it was based."

This is not such a complex case that the jury could not determine from the witnesses' testimony of the facts whether a contract was formed and, if formed, whether that contract was breached. The resolution of these fact issues was the province of the jury.

The second ruling of the trial court which must be considered concerns the admission into evidence and then the exclusion from evidence of the 1963 Public Health Service Grants Manual (defendants' exhibit 50). The trial court excluded the exhibit because "it has no application to the conduct of the parties at the time the contract was entered into and in effect attempts to change the terms of the original contract."

When Dr. Wild and Mr. Rarig submitted their January 4, 1962, application for a research award, they specifically agreed to the following: "Funds granted as a result of this request are to be expended for research or related purposes as governed by Public Health Service and grantee institution policies."

On July 23, 1962, the Public Health Service sent a "NOTIFICATION AND STATEMENT OF GRANT AWARD," setting forth the Public Health Service's policy requirements for the awards. On the reverse side of the notification is an "EXPLANATION OF STATEMENT OF RESEARCH GRANT--Revised July 1, 1961," which provides:

> "I. PUBLIC HEALTH SERVICE POLICY REQUIREMENTS:* The grantee institution is obligated to administer any Public Health Service grant or award in accordance with the policies governing the Grant and Award Programs of the Public Health Service."

A footnote to the Explanation states:

> *"REFERENCE: For further information on specific details applicable to general policies on Research Grants, see 'Grant and Award Programs of the Public Health Service, Volume I - Policy and Information Statement on Research Grants - 1959.'"

The Grants Manual excluded from evidence appears to have become effective January 1, 1963, and, if received, would have expressly provided for termination or withdrawal of sponsorship by the grantee institution.[13]

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[13] Section 515 D of the 1963 Grants Manual provides in pertinent part as follows:

> "D Termination Procedure
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> "Research grants may be terminated at any time by the grantee institution upon written notification from an authorized institution official to the sponsoring Institute or Division of the Public Health Service."

Defendants argue that the exclusion from evidence of the 1963 Grants Manual took a fact issue from the jury's determination. They contend that the trial court erred when it ruled that a contract was in existence and that the exhibit would change the terms of that contract. Dr. Wild claims that the 1963 Grants Manual is irrelevant since it was promulgated after the alleged oral sponsorship contract was formed; that the manual could not modify the terms of the oral sponsorship contract since the modification was not pleaded as an affirmative defense and the matter was not tried by consent; and that the manual only relates to the alleged Public Health Service contract.

Based upon this record, it was error not to allow the 1963 Grants Manual to be admitted into evidence since it apparently became effective on January 1, 1963, which could make it operative for a major part of this research project, and Minnesota Foundation, the Public Health Service, and Dr. Wild relied on this manual at one time or another. See, also, Rubinstein v. Mayor & City Council of Baltimore, 295 F. Supp.108 (D. Md. 1969).

Another ruling of the trial court concerned a jury instruction which stated Dr. Wild was not an employee of Minnesota Foundation.

Defendants argue that Dr. Wild's relationship with Minnesota Foundation was that of an employee, terminable at will, and that when the trial court ruled as a matter of law that he was not an employee, it took a fact issue from the jury. Dr. Wild asserts that he was an independent contractor and not an employee of Minnesota Foundation but claims that his status as such became meaningless when the trial court subsequently gave the following instruction reading in pertinent part:

> "*** If you find one of the terms to be that the contract had no definite duration, that is, it was to come to an end on no particular set day, then it was terminable at will, and the defendants had a right to terminate the contract upon giving reasonable notice."[14]

Dr. Wild claims that this instruction was substantially what the defendants desired.

We do not agree with Dr. Wild's contention that the trial court gave the equivalent of an employee-independent contractor instruction. The trial court's instructions did not prescribe the necessary elements or factors to be considered by the jury in determining if this was an

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[14] See, Skagerberg v. Blandin Paper Co. 197 Minn.291, 266 N.W.872 (1936); Cederstrand v. Lutheran Brotherhood, 263 Minn.520, 117 N. W.2d 213 (1962).

agency or an independent contractor relationship. The tests applicable to making this determination are adequately stated in previous decisions of this court. Castner v. Christgau, 222 Minn.61, 24 N.W.2d 228 (1946); Willner v. Wallinder Sash & Door Co., 224 Minn. 361, 28 N.W.2d 682 (1947); Gill v. Northwest Airlines, Inc., 228 Minn.164, 36 N.W.2d 785 (1949); Nicholas v. Hennepin Wheel Goods Co., 239 Minn. 269, 58 N.W. 2d 572 (1953); Lindbery v. J. A. Danens & Son, Inc.,266 Minn.420, 123 N.W. 2d 695 (1963); Boland v. Morrill, 270 Minn. 86, 132 N.W. 2d 711 (1965); Restatement, Agency (2d) §§ 2 and 220; 11B Dunnell, Dig. (3 ed.) § 5835. However, we agree that as a general rule, unless the evidence is conclusive, the determination of whether a person is an independent contractor is a jury question. 11B Dunnell, Dig. (3 ed.) § 5835(5). The evidence in this case indicates to us that whether Dr.Wild's status was that of an employee or that of an independent contractor was a fact issue for the jury and it was error for the trial court to have ruled as a matter of law.[15]

[15]Another problem is that judgment was entered for all claims against Minnesota Foundation, the Wilder Foundation, and Mr. Rarig. In Seavey, Ahency, § 123, p.211, the following is found: "Except in the case of a negotiable instrument, an agent is not a part to a contract made by him for his principal, unless he gives his personal promise to perform." The burden of proof is upon the one who seeks to hold the agent as a party and there is an inference that the agent is not a party to a contract made for a disclosed principal. Seavey,Agency, § 70(D), § 123. An agent's personal liability for torts committed by himself is, of course, a different matter. Seavey, Agency, § 129. A larger issue is the joint liability of both foundations. The trial court ruled as a matter of law that they were one and the same. See, Henn, Laws of Corporation, § 148. We express no view on this matter or on Rarig's personal liability for the contract.

BAD-FAITH TERMINATION OF CONTRACT

The trial court stated in its instructions that one of Dr. Wild's claims against the defendants consisted of bad-faith termination of contract. The jury awarded $2,148,300 in compensatory and punitive damages on this claim.

Defendants contend that there is no tort action for bad-faith termination of contract independent of or in addition to damages for conventional breach of contract.

Dr. Wild contends that bad-faith termination of contract was submitted to the jury as a part of the "interference with then present contract and professional business advantages and relationships" tort claims. He argues that the

trial court combined interference with contract and professional business relationships and bad-faith termination of contract as intentional torts separate and apart from breach of contract for the period from August 1, 1963 (termination of contract), up to the time of termination of the project on January 31,1964 (submitted to the jury as questions Nos. 4, 5, and 6 of the special verdict), and combined such interference and bad-faith termination following the termination of the project into interference following termination of the project (submitted in questions Nos. 7, 8, and 9).

A reading of the special verdict and the instructions convinces us that bad-faith termination of contract was submitted to the jury as a separate and distinct tort claim for which a separate recovery was awarded and that it was not a part of the "interference" claims found in questions Nos. 7, 8, and 9.

We are of the opinion that when a plaintiff seeks to recover damages for an alleged breach of contract he is limited to damages flowing only from such breach except in exceptional cases where the defendant's breach of contract constitutes or is accompanied by an independent tort. Whittaker v. Collins, 34 Minn.299, 25 N.W.632 (1885); Beaulieu v. G.N.

Ry.Co. 103 Minn.47, 114 N.W. 353 (1907); City ofEast Grand Forks v. Steele, 121 Minn. 296, 141 N.W. 181 (1913);Calamari & Perillo, The Law of Contracts, § 204; Simpson, Law of Contracts (2 ed.) § 195, p. 394. An excellent example of this is found in wilful and unlawful injuries to passengers upon railroad trains. There is in such cases a contract by the railroad company to safely carry the passenger to his destination and an implied legal duty to protect him while the relationship of passenger and carrier exists and the courts declare that a breach of that duty constitutes an independent tort, for which recovery may be had for the injury to which the passenger is subjected. In such cases the duty is an incident of the relationship rather than the contract, and the carrier would be liable if the passenger was carried free. Mykleby v. Chicago, St.P., M.& O.Ry. Co. 39 Minn. 54, 38 N.W. 763 (1888). For other examples, see, Prosser, Torts (4 ed.) § 92. We hold that this is not the exceptional case where the breach of contract amounts to an independent tort. The foundation of Dr. Wild's action was the contract, and the gravamen of it, its breach. Whittaker v. Collins, supra. The duty imposed on Minnesota Foundation was a contractual one.

Dr. Wild, however, contends that an implied covenant of good faith is found in this contract and that a bad-faith or malicious breach of that covenant provides a tort remedy.

Some courts have held that there is an implied condition of good faith in all contracts, whether sales contracts or not. 17 Am. Jur.2d, Contracts, §§ 256; 17A C.J.S., Contracts, §§ 328. Minnesota statutory law, in the Uniform Commercial Code, provides for an implied condition of good faith in sales contracts. Minn. St. 336.1-201(19), 336.1-203, 336.2-103(b). This court has read an implied condition of good faith into a nonsales contract containing reciprocal duties and obligations on the part of the contracting parties where one of the parties made it impossible for the other to perform. Haase v. Stokely-Van Camp, Inc. 257 Minn.7, 99 N.W. 2d 898, 87 A.L.R. 2d 726 (1959). Whether this court will read such a condition of good faith into all contracts has not been yet decided.

Assuming for the sake of argument that an implied covenant of good faith was maliciously broken in this contract, that malicious motive may be important in determining whether a material breach has occurred, but it is immaterial in so far as damages for contract breach are

concerned. In Independent Grocery Co. v. The Sun Ins Co. 146 Minn. 214, 217, 178 N.W. 582, 583 (1920), this court stated:

> "The motives prompting the breach of a contract are immaterial, so far as the rule of damages is concerned, and, however malicious or wrongful, the measure of compensation remains the same. North v. Johnson, 58 Minn. 242, 59 N.W. 1012; 1 Sutherland, Dam. § 99. That is settled law, with few exceptions referred to in Beaulieu v. Great Northern Ry.Co. 103 Minn.47, 114 N.W. 353, 19 L.R.A. (N.S.) 564, 14 Ann. Cas.462, ***."

See,also, 5B Dunnell, Dig. (3 ed.) § 2559. A malicious or bad-faith motive in breaching a contract does not convert a contract action into a tort action. Accordingly, we think that bad-faith termination of contract is not an independent tort of the kind that will permit a tort recovery.

STATUTE OF LIMITATIONS

The threshold issue is whether wrongful interference with business relationships by means of defamation is included in Minn. St. 541.07, the 2-year statute of limitations, or Minn. St. 541.05, the 6-year statute of limitations.[16]

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[16] The jury returned a verdict of $2,000,000 compensatory damages and $5,000,000 punitive damages for interference with contract and professional business relationships.

Defendants claim that wrongful interference with business relationships may be construed as being included in and barred by the

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Wrongful interference with contract and wrongful interference with business relationships also known as interference with contractual relations and interference with prospective advantage, Prosser, Torts (4 ed.) §§ 129,130, are actionable tort claims in Minnesota. Witte Transp. Co. v. Murphy Motor Freight Lines, Inc. 291 Minn. 461, 193 N.W. 2d 148 (1971); Snowden v. Sorensen, 246 Minn. 526, 75 N.W.2d 795(1956); Sorenson v. Chevrolet Motor Co. 171 Minn.260, 214 N.W. 754, 84 A.L.R.35 (1927); Carnes v. St. Paul Union Stockyards Co.164 Minn.457, 205 N.W. 630, 206 N.W. 396 (1925); Tuttle v. Buck, 107 Minn.145, 119 N.W. 946 (1909). See, also, American Surety Co. v. Schottenbauer, 257 F.2d 6 (8 Cir.1958). See, generally. 86 C.J.S.,Torts, §§ 40, 44, 54 to 59; 45 Am.Jur.2d, Interference; 19A Dunnell, Dig. (3 ed.) § 9637; 1 Harper & James, the Law of Torts,§§ 6.5 to 6.13. Wrongful interference with contract protects an interest in the security of contractual relationships, Prosser, Torts, (4 ed.) § 129; 1 Harper & James, The Law of Torts § 6.5, and wrongful interference with business relationships protects an interest in the reasonable expectation of economic advantage, 45 Am.Jur. 2d., Interference, § 50. However, under the facts of this case, Dr. Wild does not have a cause of action for wrongful interference with contract since that action does not permit one party to sue another party to the same contract for breaches inter se. Cuker Industries, Inc. c. William L. Crow Constr.Co. 6 App. Div.2d 415, 178 N.Y.S. 2d 777 (1958); Glazer v. Chandler, 414 Pa. 304, 200 A.2d 416 (1964); 45 Am. Jur.2d, Interference, § 26; Prosser, Torts (4 ed.)

2-year statutes of limitations because it is similar to the other intentional torts enumerated in Minn. St. 541.07. In effect, defendants argue that the claimed interference with business relationships is simply another label for defamation, since the means allegedly used to interfere was defamation, and therefore is included in the 2-year statute of limitation. Dr. Wild claims that wrongful interference with business relationships is not barred by the 2-year statute of limitations because it is a property tort and therefore is included in the 6-year statute of limitations.

Minn. St. 541.07, in pertinent part,reads:

> "Except where the uniform commercial code otherwise prescribes, the following actions shall be commenced within two years:
>
> "(1) For libel, slander, assault, battery, false imprisonment, or other tort, resulting in personal injury, and all actions against physicians, *** for malpractice, *** whether based on contract or tort; ***."

The phrase, "or other tort resulting in personal injury," was added by L. 1895, c.30, and had remained unchanged since that time.

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§ 129, p. 934, footnote 9. Dr. Wild alleges two contracts, but in each of the alleged contracts he and Minnesota Foundation are contracting parties.

The first case to construe the amended provision was Brown v. Village of Heron Lake, 67 Minn.146, 69 N.W. 710 (1897). This court construed the amended provision, with the aid of the doctrine of ejusdem generis, as not applying to actions for personal injuries arising from negligent omission to do an act.

Late, in 1897, this court considered the amendment in the case of Bryant v. American Surety Co. 69 Minn. 30, 71 N.W. 826 (1897), and held that an action for malicious prosecution for a crime was included. This court stated that the amended provision must be construed as reading as follows: "An action for libel, slander, assault, battery, false imprisonment, or other like tort resulting in personal injury as do the actions named." 69 Minn. 32, 71 N.W. 826. "Personal injury" was not construed as "bodily injury" but was construed in an exact legal sense as the equivalent of a "personal wrong." This court indicated that a "personal wrong" died with the person as found in the then G.S. 1894, § 5912, which is now Minn.St. 573.01, dealing with survival of causes.[17]

[17]Minn.St. 573.01 reads as follows: "A cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in Section 573.02 [action for wrongful death]. It also dies with the person against whom it exists, except a cause of action arising out of bodily injuries or death caused by the negligence of a decedent or based upon strict liability, statutory liability or a breach of warranty of a decedent, survives against his personal representatives. All other causes of action by one against another, whether arising on contract or not, survive to the personal representatives of the former and against those of the latter."

In Ackerman v. Chicago, St.P., M.& O. Ry. Co. 70 Minn. 35, 72 N.W. 1134 (1897), and in Ott v. G. N. Ry, Co. 70 Minn. 50, 72 N.W. 833 (1897), this court heard further arguments on what the 1895 amendment was intended to do and reaffirmed Brown v. Village of Heron Lake, supra. The court reiterated that an action for negligent personal injury was within the 6-year statute of limitations. Rejecting the argument that a negligently inflicted injury was a battery and therefore was covered by the 2-year statute, we held that battery as used therein included "an intentionally administered injury to the person,-- such an injury as could be made the basis of a criminal prosecution, and not that which resulted from the want of due care." Ott v. G. N. Ry. Co. 70 Minn. 50, 54, 72 N.W. 833, 834 (1897).

In Virtue v. Creamery Package Mfg. Co. 123

Minn. 17, 142 N.W. 930, 1136 (1913), an action for malicious prosecution of a civil suit was held to be within the 6-year statute of limitations. This court stated:

> "* * * It has been held that the action for malicious prosecution of a criminal charge is within this class [2-year limitation]. Bryant v. American Surety Co. 69 Minn. 30, 71 N.W. 826.
>
> "At first blush it might seem that malicious prosecution of a civil suit should be within the same class, but clearly it is not. The Bryant case was decided on the ground that the malicious prosecution of a criminal action is a personal wrong of the class that dies with the person, and is accordingly of the same class as libel, slander, and false imprisonment. The malicious prosecution of a civil action, on the other hand, is in no sense an injury to the person. We regard this as settled by the decision of this court in Hansen Mercantile Co. v. Wyman, Partridge & Co. 105 Minn. 491, 117. N.W. 926, 21 L.R.A. (N.S.) 727. In that case it was held that an action for maliciously procuring and levying an attachment was an action for an injury not to the person, but to property; that a cause of action for injuries resulting from the attachment, consisting of the destruction of the business and of the credit, reputation and standing of the defendant, and the driving away of customers, was not a personal tort, but a property tort, and that it was assignable. True, there was in that case a seizure of property, but that does not change the principle.***

> In either case, the injury is one to business and property and not to the person. It follows that the claim for malicious prosecution was not barred." 123 Minn. 37, 142 N.W. 938.[18]

Assault, battery, and false imprisonment are intentional torts. Libel and slander are in the nature of strict liability torts as long as the defamer intends to publish his statement to a third person. At common law,

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[18] Other cases construing the 2-year and 6-year statutes of limitations are as follows: In Langer v. Newman, 100 Minn.27, 110 N.W. 68 (1907), this court treated an action seeking damages for preferring a false charge of insanity against a person as one for a tort resulting in personal injury and consequently included in the 2-year statute of limitations. In the case of Preston v. Cloquet Tie & Post Co. 114 Minn. 398, 131 N.W. 474 (1911), this court held that a conversion action was included in the 6-year statute of limitations. In the case of Quackenbush v. Village of Slayton, 120 Minn.373, 139 N.W. 716 (1913), this court reaffirmed Brown v. Village of Heron Lake, 67 Minn. 146, 69 N.W.710 (1897); Ackerman v. Chicago, St.P., M. & O. Ry. Co. 70 Minn.35, 72 N.W. 1134 (1897); and Ott v. G. N. Ry. Co. 70 Minn. 50, 72 N.W. 833 (1897), and stated that negligent personal injuries were not included in the 2-year statute of limitations. In the case of Villaume v. Wilkinson, 209 Minn.330, 296 N.W. 176 (1941), this court held that the complaint stated a cause of action for negligence and was therefore governed by the 6-year statute. See, also, 11A Dunnell, Dig. (3 ed.) § 5655.

the above torts did not survive the death of either party. Prosser, Torts, (4 ed.) § 126. It would appear that the same is true under Minn. St. 573.01, the survival statute.[19] Bryant v. American Surety Co. supra. See, also, 1 Hanson, Libel and Related Torts, § 206. The above torts may also be the basis of a criminal prosecution.

At common law, there was a split over whether interference with business relations survived. Pro: Sullivan v. Associated Billposters and Distributors, 6 F. 2d 1000, 42 A. L. R. 503 (2 Cir. 1925); Bethlehem Fabricators, Inc. v. H. D. Watts Co. 286 Mass. 556, 190 N. E. 828, 93 A. L. R. 1124 (1934). Contra: Caillouet v. American Sugar Refining Co 250 F. 639 (E.D. La. 1917); Jones v. Matson, 4 Wash,2d 659, 104 P. 2d 591 (1940). The better reasoned cases appear to be the former, which hold the tort claim survivable and assignable because it resembles a property or a contract claim. Similarly, wrongful interference with business relationships is not usually the basis of a criminal prosecution. Accordingly, we think that wrongful interference with business relationships is generally included in Minn. St.

[19] See, note 16, supra.

541.05, the 6-year statute of limitations.

However, under the facts of this case, we hold that Dr. Wild's claim of wrongful interference with business relationships by means of defamation is essentially a part of his cause of action for defamation and consequently comes within Minn. St. 541.07, the 2-year statute of limitations. The defamation which is the means used to interfere with his business relationships action is the same defamation that Dr. Wild seeks to recover damages for under his defamation claim. It seems to us that, regardless of what the suit is labeled, the thing done to cause any damage to Dr. Wild eventually stems from and grew out of the defamation. Business interests may be impaired by false statements about the plaintiff which, because they adversely affect his reputation in the community, induce third persons not to enter into business relationships with him. We feel this phase of the matter has crystallized into the law of defamation and is governed by the special rules which have developed in the field. Defamation provides a much broader scope of recovery than wrongful interference with business relationships. Under present defamation law, a victim of defamation may recover, under proper circumstances, general dam-

ages; special damages, including among others. loss of business relationships; and possibly punitive damages. See, also, 1 Hanson, Libel and Related Torts, § 162; 1 Seelman, The Law of Libel and Slander in the State of New York, §§ 371, 374, 382; 1 Harper & James, The Law of Torts, § 5.30; Prosser, Torts (4 ed.) § 112; 11A Dunnell, Dig. (3 ed.) §§ 5508, 5550, 5562a; 53 C. J. S.. Libel and Slander, §§ 238 to 245, 260, 263 to 266.

Another issue dealing with Minn. St. 541. 07 on which Minnesota has no statutory law or case law is: When d es a cause of action for defamation accrue in order to commence the running of the statute of limitations?[20]

The contentions of the parties are as follows:

Defendants assert that Dr. Wild's defamation claims are barred by the 2-year statute of limitations; that a cause of action under the 2-year statute accrues when a lawsuit could first have been initiated; that Dr. Wild's cau-

[20]Minn. St. 541.02, in pertinent part, reads as follows: "Actions can only be commenced within the periods prescribed in this chapter, after the cause of action accrues." Minn. St. 541.15 on disabilities which will toll the statute is inapposite to the present fact situation.

ses of action had accrued by May 1964 and that Dr. Wild had sufficient knowledge to bring his lawsuit before December 3, 1966; that Dr. Wild's assertion that defendants fraudulently concealed the facts constituting the basis for his claims, which he argues tolled the statute of limitations, is without merit because there was no affirmative act or misrepresentation by them which prevented Dr. Wild from discovering the existence of his causes of action. In the alternative, defendants contend that the issues of fraudulent concealment of Dr. Wild's causes of action should have been a factual question for the jury under suitable instructions.

Dr. Wild argues that his causes of action for defamation and interference are not barred because the 2-year statute was tolled by defendants' fraudulent concealment of the existence of his causes of action and by defendants' continuing conspiracy to defame him; and that, even if fraudulent concealment was a fact issue for the jury, defendants waived their right to such an instruction because they did not request one at the trial.

Because we are dealing with an open question in this jurisdiction, we will simply list the various rules on the issue and suggest that the trial court apply that law to the facts

on retrial.

The commentators and courts that have faced the issue have generally found that a cause of action accrues when the defamatory matter is published to a third party. They have found that when the matter is not defamatory per se, a cause of action accrues only when special damage is suffered. Gatley, Libel and Slander (4 ed.) c. 19, p. 382; 1 Seelman, The Law of Libel and Slander in the State of New York, §§ 189a, p. 231; 1 Hanson, Libel and Related Torts, §§ 154, p. 119; 50 Am. Jur. 2d, Libel and Slander, §§ 390; 53 C. J. S., Libel and Slander, §§ 156; Restatement, Torts, §§ 899, Comment c; Miles v. McGrath, 4 F.Supp. 603, 604 (D. Md. 1933); Brown v. Chicago. R.I. & P. R. Co. 212 F. Supp. 832, 834 (W.D. Mo. 1963), affirmed, 323 F. 2d 420 (8 Cir. 1963); Hartmann v. Time, Inc. 64 F. Supp. 671, 678 (E. D. Pa. 1946), modified, 166 F. 2d 127, 135, 1 A. L. R. 2d 370 (3 Cir. 1947, 1948), certiorari denied, 334 U.S. 838, 68 S. Ct. 1495, 92 L. ed. 1763 (1948); Gregoire v. G. P. Putnam's Sons, 298 N.Y. 119, 81 N.E. 2d 45 (1945). See, also, Annotations, 1 A. L. R. 2d 884, 42 A. L. R. 3d 807.

Ignorance or lack of knowledge of a defamatory publication will not toll the statute

of limitations. Irvin v. Bentley, 18 Ga. App. 662, 90 S.E. 359 (1916); Kern v. Hettinger, 303 F. 2d 333, 338 (2 Cir. 1962); Grist v. Upjohn Co. 1 Mich. App. 72, 134 N.W. 2d 358 (1965); Forman v. Mississippi Publishers Corp. 195 Miss. 90, 107, 14 So. 2d 344, 347, 148 A. L. R. 469, 473 (1943); Brown v. Chicago, R. I. & P. R. R. Co. 212 F. Supp. 832, 835 (W. D. Mo. 1963), affirmed, 323 F. 2d 420 (8 Cir. 1963); Hartmann v. Time, Inc. 64 F. Supp. 671, 678 (E. D. Pa. 1946), modified, 166 F. 2d 127, 1 A. L. R. 2d 370 (3 Cir. 1947, 1948), certiorari denied, 334 U. S. 838, 68 S. Ct. 1495, 92 L. ed. 1763 (1948) 1 Hanson, Libel and Related Torts, §§ 154; 1 Seelman, The Law of Libel and Slander in the State of New York, §§ 189a, p. 231; Restatement, Torts, §§ 899, Comment e. See, also, 54 C. J. S., Limitations of Actions, §§ 205; 51 Am. Jur. 2d, Limitations of Actions, §§ 146; 11A Dunnell, Dig. (3 ed.) §§ 5609, for the general rule that ignorance or lack of knowledge of the existence of a cause of action will not toll the statute of limitations for most claims.[21]

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[21]While existing law in most jurisdictions holds that the statute of limitations on defamation starts to run on publication, and, further, that lack of knowledge on the part of the one defamed will not toll the statute, as indi-

Fraudulent concealment of a defamatory publication will toll the 2-year statute of limitations until discovery or reasonable opportunity for discovery of the publication by the exercise of ordinary diligence. Cf. McCarlie v. Atkinson, 77 Miss. 594, 27 So. 641 (1900);

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cated in the text, it has been suggested that an exception should be carved out of the general rule in the case of a so-called "private libel" such as an interoffice memorandum, intercompany correspondence, private letters, or correspondence between business or research entities and a governmental unit relative to mutual concerns. In these latter cases, where the defamed person is unaware of the defamation because of the limited extent of publication -- as contrasted to a "public defamation" in the press, on the air, or from a public platform-- he may, nevertheless, be seriously damaged, and a strong argument can be made that the statute should not commence to run until the defamed person knows of the publication of the defamatory material, or in the exercise of reasonable care, should know of the existence of the same. This test, of course, is somewhat analogous to the "discovery rule" in medical malpractice cases which so far Minnesota has declined to adopt. Schmucking v. Mayo, 183 Minn.37, 235 N.W. 633 (1931); Johnson v. Winthrop Laboratories Division of Sterling Drug, Inc., 291 Minn.145, 190 N.W. 2d 77 (1971). Nevertheless, in order that the question of a "private libel" might be preserved for future consideration, the trial court assigned to try the case on remand may wish to submit an interrogatory which asks the jury to determine when Dr. Wild knew, or in the exercise of reasonable care, should have known of

Staples v. Zoph, 9 Cal. App. 2d 369, 49 P. 2d 1131 (1935); Restatement, Torts, § 899, Comment e. See, also, 54 C. J. S., Limitations of Actions, § 206; 51 Am. Jur. 2d, Limitations of Actions § 147; 11A Dunnell, Dig. (3 ed.) § 5608; Schmucking v. Mayo, 183 Minn.37, 235 N.W. 633 1931); Couillard v. Charles T. Miller Hospital, Inc. 253 Minn. 418, 92 N.W. 2d 96 (1958), for the general rule that for most causes of action fraudulent concealment of the existence of a cause of action will toll the statute of limtations, postponing the commencement of the running of the statute until discovery or reasonable opportunity for discovery of the fact by the exercise of ordinary diligence. The party claiming fraudulent concealment has the burden of showing that the concealment could not have been discovered sooner by reasonable diligence on his part and was not the result of his own negligence. Duxbury v. Boice, 70 Minn. 113, 120, 72 N.W. 838, 839 (1897).

There is no categorical definition of what constitutes fraudulent concealment. 54 C. J. S., Limitations of Actions, § 206(f). One text states that --

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the particular alleged defamatory matter in question.

"* * * the concealment must be fraudulent or intentional and, in the absence of a fiduciary or confidential relationship, there must be something of an affirmative nature designed to prevent, and which does prevent, discovery of the cause of action. * * *

"Although mere silence or failure to disclose may not in itself constitute fraudulent concealment, any statement, word or act which tends to the suppression of the truth renders the concealment fraudulent." 51 Am. Jur. 2d, Limitation of Actions, § 148.

In this vein, it should be mentioned:

"* * * It is not necessary that a party should know the details of the evidence by which to establish his cause of action; it is enough that he knows that a cause of action exists in his favor, and when he has this knowledge it is his own fault if he does not avail himself of those means which the law provides for prosecuting or preserving his claim." 54 C. J. S., Limitations of Actions, § 206(e).

DEPOSITIONS

Sometime in 1963 or 1966, John R. Graham, one of Dr. Wild's attorneys, allegedly learned from Dr. Costas Assimacopoulos, a Ph. D. candidate doing research at Mount Sinai Hospital, that Dr. Francisco Grande, director of the Research Laboratory at Mount Sinai, had attended a meeting at Mount Sinai regarding the project in advance of Dr. Wild's meeting with the research committee on December 9, 1963. At the

earlier meeting, Rarig allegedly made disparaging remarks about Dr. Wild and the project. Dr. Assimacopoulos allegedly inferred to Graham that Rarig's remarks were the basis for Mount Sinai's decision not to accept sponsorship. Graham sought confirmation of this from Dr. Grande in 1966, but Dr. Grande could not recall the conversation with Dr. Assimacopoulos. Dr. Wild subsequently took the depositions of Dr. Grande (on May 5, 1970) and Dr. Assimacopoulos (on June 22, 1970), in which their depositions previous assertions were repeated.

At the trial, Dr. Wild attempted to subpoena Dr. Grande, who lived in Minnesota but who was temporarily out of the state. After having read Dr. Grande's deposition into evidence, Dr. Wild's counsel was permitted to use the deposition of Dr. Assimacopoulos, who was an out-of-state resident. The trial court did not instruct the jury as to whether Dr. Assimacopoulos' deposition was to be used as substantive evidence or was to be used for impeachment only, and defendants did not request a cautionary instruction.

Defendants assert that Dr. Assimacopoulos' deposition testimony was hearsay; that the trial court gave no cautionary instruction to indicate that Dr. Assimacopoulos' deposition

was to be used for impeachment purposes only; and that Dr. Assimacopoulos' deposition could not be used for impeachment purposes anyway since no surprise was shown and Dr. Wild would be impeaching his own witness (Dr. Grande).

Dr. Wild argues that Dr. Assimacopoulos' deposition testimony was not hearsay but a verbal act used, not to prove the truth of the matter asserted, but to prove he "was making efforts to get a new sponsor, and that it was unsuccessful because of an appearance by Rarig before the Mcunt Sinai Board"; that if considered hearsay, it is admissible under one or more of 15 exceptions to the hearsay rule; that if considered impeachment, he could properly impeach his own witness because he was "surprised"; and that in any event the evidence was merely cumulative.

We think that Dr. Assimacopoulos' deposition, if used as substantive evidence, was clearly hearsay and not within an exception to the hearsay rule. The content of a deposition is treated under the exclusionary rules of evidence as though the witness were then present in court and testifying. Rules of Civil Procedure, Rule 26.05. If Dr. Assimacopoulos were present in the courtroom, his testimony would be stricken as hearsay and that

rule must apply to his deposition also.

Since Dr. Assimacopoulos' deposition was not admissible as substantive evidence, the relevant issue is whether it could be used for impeachment purposes. We think the applicable law is well settled. The following statement may be found in 20 Dunnell, Dig. (3 ed.) §§ 10356:

> "* * * It is the general rule that a party cannot impeach a witness whom he has called by proof of contradictory statements out of court. * * * If a party is surprised by the adverse testimony of his own witness he may be permitted by the court, in the exercise of its discretion, to impeach the witness by proof of contradictory statements, a proper foundation being laid. This applies to criminal as well as civil cases."

Whether or not there is genuine surprise "presents a preliminary question for determination by the trial court, and ordinarily we will not reverse unless there is an abuse of discretion." State v. Guy, 259 Minn. 67, 73, 105 N.W. 2d 892, 897 (1960). The principles applicable to the right to impeach a party's own witness are adequately stated in former decisions of this court and other courts. Selover v. Bryant, 54 Minn. 434, 56 N.W. 58 (1893); State v. Saporen, 205 Minn.

358, 285 N.W. 898 (1939); Fjellman v. Weller, 213 Minn. 457, 7 N.W. 2d 521 (1942); State v. Dahlgren, 259 Minn. 307, 107 N.W. 2d 299 (1961); State v. Schwartz, 266 Minn. 104, 122 N.W. 2d 769 (1963); State v. Johnson, 289 Minn. 346, 184 N.W. 2d 660 (1971). See also, Young v. United States, 97 F. 2d 200 (5 Cir. 1938).

If Dr. Grande had personally testified, Dr. Wild could not have impeached him since there would have been no genuine surprise on his part.[22]

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[22]The rules of evidence relating to impeachment of a party's own witness have been substantially modified under Rule 43.02 of the Rules of Civil Procedure, but that rule does not apply to Dr. Grande. Rule 43.02 reads as follows:

> "A party may interrogate an unwilling or hostile witness b leading questions. A party may call an adverse party or his management agent or employe or an officer, director, managing agent or employe of the state or any political subdivision thereof or of a public or private corporation or of a partnership or association or body politic which is an adverse party, and interrogate him by leading questions and contradict and impeach him on material matters in all respects as if he had been called by the adverse party. Where the witness is an adverse party he may be examined by his counsel upon the subject matter of his examination in chief under the rules applicable to direct examination, and may be cross-examined, contradicted and impeached by any other party adversely affected by his testimony. Where the witness is an officer, director, managing agent or employe of the adverse party he may be cross-examined, contradicted and impeached by any party to the action."

The pivotal issue is whether the general rule against impeachment of a party's own witness except when his testimony results in genuine surprise will be followed when depositions are used.

Rule 26.06, Rules of Civil Procedure, reads as follows:

> "A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in Rule 26.04 (2). At the trial or hearing, any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party."

See, also, McCormick, Evidence (2 ed.) §§ 38, footnote 80. Under Rule 26.06, when Dr. Wild introduced Dr. Grande's deposition into evidence, he made Dr. Grande his own witness. Consequently, we hold that the general rule agai-

nst impeaching a party's own witness applies, and Dr. Wild could not attack Dr. Grande's credulity since he was not genuinely surprised. Dr. Wild is indirectly doing what he cannot do directly. He is offering a witness whose testimony he knows in advance will be adverse in order to put before the jury, in the form of impeachment, contradicting statements which are useful to his case. This is a contrived impeachment situation in which the only value of the witness's prior statement will be as substantive evidence of the facts asserted, McCormick, Evidence (2 ed.) § 38, p. 76, and admission of the Assimacopoulos deposition was error.

DEFENDANTS' EXHIBIT 101

Paul I. Wolf, vice president of engineering for the Digital Scientific Corporation, a California entity, testified that he worked for Dr. Wild at St. Barnabas Hospital from 1953 to September 1960. His general dissatisfaction with the situation at St. Barnabas Hospital culminated in an April 13, 1960 letter (defendants' exhibit 101), jointly written and signed by himself, by Dr. Harry Crawford, co-principal investigator on Dr. Wild's project at St. Barnabas, and by Elwood Jacobson,

a member of Dr. Wild's staff who is now dead. Wolf testified he hand-delivered the letter to Dr. Finn Larsen, a member of the St. Barnabas board and an advisor to the St. Barnabas Foundation, who is now deceased, and that the letter reflected the witness' views and those of his two colleagues on the status of the Dr. Wild project. The trial court sustained Dr. Wild's hearsay objection.

The letter, if received into evidence, would have revealed criticisms of Dr. Wild's handling of his staff, his capricious and arbitrary manner of making scientific decisions, and of his lack of competence in electronics, and a suggestion that a new director should be appointed to take over the project. Defendants claim the letter was admissible as a business record under Minn. St. 600.02, while Dr. Wild argues that the exclusion of the letter "was a fair and reasonable exercise of discretion by the trial judge"; that the exhibit was cumulative; and that its exclusion from evidence was not prejudicial.

The Minnesota Uniform Business Records as Evidence Act, in Minn. St. 600.01, reads as follows:

> "The term 'business' shall include every kind of business, profession, occupation, calling or operation of institu-

tions, whether carried on for profit or not."

Minn. St. 60002 reads as follows:

> "A record of an act, condition, or event shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission."

The above statute requires that entries be made in the "regular course of business." This means that it was in the regular course of the business to make such entries; that it was the routine of the particular business to make such entries, McCormick, Evidence (2 ed.) § 308; 5 Wigmore, Evidence (3 ed.) § 1523; and that the entry was not a casual and isolated one, 5 Wigmore, Evidence (3 ed.) § 1525. The element or circumstantial guarantee of trustworthiness and the element of necessity, needed to obviate the hearsay rule, are found in the systematically and habitually made entries which are then relied on by the particular business. In other words, the records have a likelihood of being truthful because they are relied on by the particular business in the

conduct of its affairs.

This letter (defendants' exhibit 101) was not a business record. It was a personal evaluation of Dr. Wild made by three members of his staff. This evaluation was not part of the regular course of business of the scientific project. The authors of the letter were employed to do scientific research and not to write a letter evaluating their scientific leader. This letter is not the type of record entry regularly and systematically kept and, therefore, likely to be reasonably trustworthy. The trial court properly excluded it from evidence.

LYMAN COLE'S TESTIMONY

A few weeks after the trial had begun, Dr. Wild's counsel, in chambers, requested the trial court's permission to use Lyman Cole's testimony to introduce evidence he would otherwise elicit from Justice James C. Otis, a member of the Minnesota Supreme Court and a director of Amherst Wilder Foundation and Minnesota Foundation. An offer of proof was made and a hearsay objection was sustained. The trial court intimated that Justice Otis should be called as a witness and then impeached by Cole's testimony.

Later in the trial, Justice Otis was

called as a witness and testified that he had"no recollection" of a telephone call from the late John Dorsey, a Minneapolis attorney, in November or December of 1963 as to why Minnesota Foundation terminated sponsorship of Dr. Wild's research project.

Dr. Wild subsequently put on the stand Lyman Cole, a Minneapolis investment banker, who testified that he, Dr. Wild and Sidney Colbert, chairman of the advisory committee, met with the late John Dorsey in the latter's office at which time Dorsey allegedly telephoned Justice Otis regarding the reasons for Minnesota Foundation's termination of sponsorship. Although he could not hear the voice on the other end of the telephone conversation, Mr. Cole testified that Mr. Dorsey had related Justice Otis' conversation regarding the reasons for termination of Dr. Wild's project.

Defendants objected that Cole's testimony was hearsay, conversations with a dead person, and was given without proper foundation or identification of the person to whom John Dorsey was talking. The trial court overruled defendants' objections and did not instruct the jury as to whether Cole's testimony was to be used as substantive evidence or only for the purpose of impeachment of Justice Ctis'

credibility. No cautionary instruction was requested by the defendants.

Defendants assert that the trial court committed error in these rulings and in not instructing the jury that Lyman Cole's testimony was to be used for impeachment purposes only. They argue that when the trial court failed to do this, Cole's testimony was permitted to be interpreted by the jury as substantive evidence. Dr. Wild claims that Cole's testimony was admissible as substantive evidence under the res gestae exception to the hearsay rule or else was admissible for impeach ment purposes.

Since it is unclear which purpose the trial court admitted Lyman Cole's testimony for, we will consider it as either substantive evidence or as impeachment. If the trial court admitted Cole's testimony as substantive evidence, it was error since it is clearly double hearsay and does not come within an exception to the hearsay rule. McCormick, Evidence (2 ed.) §§ 246.

Because Cole's testimony was not admissible as substantive evidence, the relevant issue is whether it could be used for impeachment purposes. We think that it could not. There is no doubt that prior inconsistent

statements which are hearsay may be used for impeachment purposes. McCormick, Evidence (2 ed.) §§ 34, footnote 7, and 39. It is also true that a witness may be impeached if he denies or fails to recollect making the prior inconsistent statement. Price v. Grieger, 244 Minn. 466,472, 70 N.W. 2d 421, 425 (1955); McCormick, Evidence (2 ed.) § 37 and footnote 47. However, before a witness may be impeached by a prior inconsistent statement, it should be sh n by adequate foundation that he made a prior inconsistent statement. That was not done in this case as Cole could not hear the voice on the other end of the telephone conversation. That voice, if there was one, could have been the voice of anyone.

All other issues raised in this appeal have been considered and are deemed without merit.

Reversed and remanded for a new trial with directions.

IRVINE, Justice (concurring specially).

I agree that there must be a new trial if all issues are to be considered. However, if the case were properly tried, it seems likely that the plaintiff would be able to establish a cause of action for defamation or

interference with future contracts (but not both), and that he could prove damages. Therefore, in order possibly to avoid the agony and the expense of a new trial, I would give the plaintiff the option of agreeing to a remittitur to One Million Five Hundred Thousand Dollars ($1,500,000).

ODDEN, Justice (concurring specially).

I agree with the concurring opinion of Judge Irvine.

JOHNSON, Justice (concurring specially).

I agree with the concurring opinion of Judge Irvine.

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APPENDIX B

ORDER DENYING PETITION FOR REHEARING

Upon all the files and records herein, and each of the undersigned acting justices, deeming that he is fully advised in the premises, does hereby join in making the following order:

IT IS HEREBY ORDERED that respondent's petition for rehearing in the above entitled matter be, and hereby is, in all respects, denied.

Dated this 31st day of July, 1975.

BY THE COURT

/s/Robert Breunig
Acting Justice

/s/Glenn E. Kelley
Acting Justice

/s/Rolf Fosseen
Acting Justice

/s/L. J. Irvine
Acting Justice

/s/Donald C. Odden
Acting Justice

/s/Chester G. Rosengren
Acting Justice

/s/C. A. Rolloff
Acting Justice

/s/James E. Preece
Acting Justice

/s/Wm. T. Johnson
Acting Justice

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
NO. 75-921

JOHN J. WILD, M. D.,

Appellant,

vs.

FRANK M. RARIG, MINNESOTA FOUNDATION,
a Minnesota nonprofit corporation,
and AMHERST H. WILDER FOUNDATION,
a Minnesota nonprofit corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO DISMISS AND SUPPORTING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional and Statutory Provisions:

Rules:

Texts:

Periodicals:

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Appellees.

On Appeal From the Supreme Court
of Minnesota

MOTION TO DISMISS

Appellees Rarig, Minnesota Foundation and Amherst H. Wilder Foundation hereby move, pursuant to Rule 16(1)(b) of the Rules of this Court, to dismiss the appeal on the grounds that the questions presented in the Jurisdictional Statement were not properly raised nor expressly passed on, that the decision of the Minnesota Supreme Court below rests entirely upon adequate and independent

nonfederal grounds and represents simply the resolution of a question of fact and that the questions presented are so unsubstantial as not to warrant further argument.

BRIEF IN SUPPORT OF MOTION
QUESTIONS PRESENTED

1. Did the Appellant properly present, and did the Minnesota Supreme Court finally decide, the federal questions which Appellant has raised in the Jurisdictional Statement?

2. Does the decision of the Minnesota Supreme Court rest upon adequate and independent state grounds?

3. Is there a substantial question as to the validity of Minn. Stats. § 2.724, Subd. 2 (1974), as applied in this case, under either the due process clause or the equal protection clause of the Fourteenth Amendment to the United States Constitution?

COUNTER-STATEMENT OF THE CASE

This is a motion to dismiss an appeal from a judgment of the Minnesota Supreme Court reversing a money judgment on behalf of Appellant against Appellees and remanding the case for a new trial.* ___Minn.___, 234 N.W.2d 775 (1975). Appellant's judgment was entered on December 6, 1972 following a jury trial in the Hennepin County District Court of Minnesota. The Minnesota Foundation is a nonprofit corporation organized in 1949 which is separate from but contractually related to Amherst H. Wilder Foundation. The Wilder Foundation had been founded under a special law in 1910. See Chapter 222, Laws of Minnesota (1909). Both are charitable institutions primarily

*Wild v. Rarig,

engaged in providing services to the needy of St. Paul, Minnesota. Appellee Frank M. Rarig was, during all relevant times, the Executive Secretary of the Wilder Foundation and the Minnesota Foundation. Appellant, Dr. John J. Wild, had served as the "Principal Investigator" on a research project funded by a 1962 grant to Minnesota Foundation from the United States Public Health Service. In 1966 Wild sued Appellees on various theories arising from Minnesota Foundation's termination of Wild's employment for, and its sponsorship of, the project on December 31, 1963.

The trial court entered a judgment against Appellees in the amount of $16,277,300, for aggregated tort, contract and punitive damages, a combination of the jury's several special verdicts. A joint Notice of Appeal to the Minnesota Supreme Court was filed by Appellees on February 15, 1973. Thereafter, Wild filed "Affidavits of Prejudice" against all seven justices of the Minnesota Supreme Court, together with three retired justices, and then made a Motion seeking their disqualification and recusation. [See Motion filed March 26, 1973]. This Motion was based upon Wild's allegations of bias on the part of the members of the court against himself and his counsel, as well as upon the claim that all of the justices of the Minnesota Supreme Court were "visitors" of the Wilder Foundation.[1/] The Motion

[1/] The ancient wills creating two of the three charitable trusts ultimately consolidated into the Wilder Foundation contained "requests" by the testators that the persons acting as judges of Minnesota's highest court "exercise frequently visitorial powers" over the administration of the charities. The Articles of

was filed despite the fact that Wild's counsel had previously been advised that all of the justices had elected to excuse themselves from hearing the appeal. [See letter from Clerk dated March 12, 1973].[2] The Motion was denied.

Subsequently, by Order of the Minnesota Supreme Court dated April 10, 1974, and pursuant to the authority of Minn. Const. art. VI., § 2 and Minn. Stats. § 2.724, subd. 2 (1974) [Chapter 18, Laws of Minnesota (1973)], a panel of nine[3] judges of the Minnesota State District

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Incorporation of the Wilder Foundation [executed pursuant to Chap. 222, Laws of Minn. (1909)] make no mention of such request or authorization. There is no evidence that any member of the Minnesota Supreme Court has ever accepted responsibility or acted as a "visitor" of the Wilder Foundation. Under Minnesota law, the state attorney general is specifically charged with the enforcement of public or charitable trusts and with the representation of all beneficiaries of such trusts. See Minn. Stats. § 501.12, Subd. 3 (1974).

[2] James C. Otis, Associate Justice of the Minnesota Supreme Court, had long been a member of the Board of Directors of both foundations and also appeared as a witness at trial; there was never any indication that Justice Otis would take any part in the appellate consideration of the case. Appellant has urged that Justice Otis' mere presence on the court has somehow infected the entire court, and all substitute justices as well, with bias and prejudice.

[3] After the filing of the notice of appeal to the state supreme court, but prior to the appointment of the temporary panel, legislation

Court was appointed to hear and decide the appeal in place of the court's permanent members.[4] A series of motions, pleadings and affidavits of prejudice was filed by Appellant in an attempt to prevent any hearing of the appeal by the temporary panel of the Minnesota Supreme Court. These proceedings included an action in the United States District Court for the District of Minnesota, Fourth Division, in which Appellant sought to obtain, among other things, an order of the federal court enjoining the prosecution or hearing on the appeal to the state supreme court. Wild v. Knutson, Civil No. 4-73-473 (D. Minn. 1973). By order dated December 13, 1973, the late Judge Phillip Neville dismissed the action for failure to state a claim. Wild's motion to vacate this order was denied by Judge Edward Devitt, acting in the absence of Judge Neville. Wild's appeal from the order was summarily dismissed by the Eighth Circuit Court of Appeals.

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increasing the membership of the court from seven to nine justices became effective. See Chapter 726, § 1, Laws of Minnesota (1973). The two newly appointed associate justices, along with the new chief justice who assumed his duties during the same period, joined sua sponte in excusing themselves from consideration of the appeal.

[4] The replacement judges were chosen in the following manner: The Chief Judge (selected by all the judges of his district) from each judicial district of the state, with the exception of the district in which the Appellee charitable foundations are established, was invited to serve. In three cases, the Chief Judge of the district was unable to serve, and the senior judge of that district agreed to

Wild v. Knutson, No. 74-1137 (8th Cir., June 13, 1974).

Wild's various further attempts to prevent a hearing of the appeal by the substitute panel of the Minnesota Supreme Court were each denied and a hearing was finally had. On January 10, 1975, the panel filed its decision reversing the judgment obtained by Appellant in the trial court and remanding the matter for a new trial with directions. Thereafter, Appellant's Petition for Rehearing was denied on July 31, 1975. Wild then filed yet another Motion seeking various forms of relief, including de novo consideration of the appeal by the permanent justices of the Minnesota Supreme Court and an award of $520,000 in costs and attorneys' fees as a prerequisite to any retrial of the lawsuit. [See Motion filed August 15, 1975]. By order of the permanent Minnesota Supreme Court dated October 16, 1975, this Motion was denied and the matter was remanded to the trial court. This appeal followed.

I.

THE RECORD FAILS TO ESTABLISH THAT APPELLANT PROPERLY PRESENTED OR THAT THE MINNESOTA SUPREME COURT DECIDED ANY OF THE FEDERAL QUESTIONS SOUGHT TO BE PRESENTED FOR REVIEW.

In order for the jurisdiction of this Court to be established in the instant case, it must affirmatively appear from the record that the federal questions alleged by Appellant to

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serve. These nine district judges were then appointed pro tempore justices of the Minnesota Supreme Court by its new chief justice, Robert J. Sheran.

require review were presented to the Minnesota Supreme Court and that these questions were actually decided by that court. Honeyman v. Hanan, 300 U.S. 14, 18 (1937); Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54 (1934). It is Appellant's burden to establish that this Court has jurisdiction of the appeal. Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942). Where both the proper presentation of a federal question and a decision of that question by the state court do not clearly appear on the record, the appellate jurisdiction of this Court fails. Cardinale v. Louisiana, 394 U.S. 437 (1969).

Appellant's Jurisdictional Statement fails to demonstrate the jurisdiction of this Court. A review of the record made before the Minnesota Supreme Court demonstrates that Appellant did not present that court with the federal questions listed in his Jurisdictional Statement. As a consequence, the state court did not finally decide those questions nor was the resolution of these claimed federal questions necessary to the Minnesota court's decisions and action. Appellant has listed twelve compound questions, containing no less than twenty-one separate parts, which he claims are raised by the record below. The frivolous nature of this claim is amply evident not only from the record, but also from Appellant's failure to express the great bulk of these questions in the terms and circumstances of this case, as required by Rule 15(1)(c) of this Court's rules.[5/] The only questions which Appellant even arguably attempted to raise below are contained in Questions 1 and 2 [Juris. Stmt., pp. 7-8] and only these will be treated in this Motion.

[5/] See, e.g., Question 9 [Juris. Stmt., p. 11].

Initially Appellant relies upon his Motion to Dismiss the appeal below, filed on August 28, 1973, to establish proper presentation of his federal questions. This reliance is misplaced in view of the fact that this Motion was expressly made "without prejudice" to Appellant's claimed (but unspecified) rights under the federal and state constitutions. [Motion, p. 5]. The Motion and Memorandum in support thereof did not refer specifically to any provisions of the federal Constitution, but rather presented the general law questions of "estoppel" and "waiver" and cited Minnesota precedent on these issues.[6/] In addition, Appellant made broad assertions concerning denial of "due process" and "constitutional rights" without differentiating between the state and federal constitutions or citing relevant provisions of either. It is well established that a federal question is not properly

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6/ In the context of the subject Motion, the issues of both estoppel and waiver were matters of state law. See Double-E Sportswear Corp. v. Girard Trust Bank, 488 F.2d 292 (3d Cir. 1973); 21 Turtle Creek Square, Ltd. v. New York State Teachers' Retirement System, 432 F.2d 64 (5th Cir. 1970), cert. denied 401 U.S. 955 (1971); Phillips v. Glenn Falls Ins. Co., 288 F.Supp. 151, 155 (D. W. Va. 1968), aff'd 409 F.2d 206 (4th Cir. 1969); Glenn v. State Farm Mut. Auto. Ins. Co., 341 F.2d 5 (10th Cir. 1965).

presented by allegations of general unconstitutionality and denial of due process and that, in the absence of any greater specification, it will be assumed that such references are to the state constitution involved. Herndon v. Georgia, 295 U.S. 441 (1935); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, at 67-68 (1928); Bowe v. Scott, 233 U.S. 658 (1914). As stated in Oxley Stave Co. v. Butler County, 166 U.S. 648, 655, (1897),

> [T]he jurisdiction of this court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.

It certainly cannot be said that the vague averments of Appellant's dismissal Motion were sufficient to support the instant appeal.

Appellant next turns to his Motion below for, inter alia, leave to subject members of the substitute Supreme Court to interrogation, which was filed on April 22, 1974. By that Motion, Appellant requested various alternative forms of relief, including disclosure of the method by which the substitute judges had been appointed, but sought primarily the opportunity to conduct a voir dire examination prior to the hearing of the appeal. In the third portion of his Motion, Appellant moved that "further or alternatively to the foregoing," the temporary Supreme Court declare Chapter 18, Laws of Minnesota (1973) unconstitutional as applied to his case. In connection with this request, Appellant cited a prior Minnesota Supreme Court decision, Article

1, Section 8 of the Minnesota Constitution and the Fourteenth Amendment to the United States Constitution, asserting that these authorities "prohibit any disqualified judge . . . from acting in any way either privately or at personal discretion in the cause wherein he is disqualified . . . ." [Motion, p. 2]. No further argument or citation of authority was provided.

It is not at all clear that a federal question was raised by this alternative request for relief. What is clear, however, is that no decision of any federal question was thereby required and that the substitute court did not consider itself confronted with a question as to the federal Constitutional validity of Minn. Stats. § 2.724. As the order and memorandum filed by that court on May 6, 1974 makes evident, the judges considered themselves bound only to respond to Wild's factual allegations concerning their own judicial bias or interest and to his questions concerning the manner in which they had been appointed. In this regard, it is important to note that the third "alternative" portion of the Motion was made without any supporting argument or citation of authority. As a result, under Rule 128.01(4), Minn. R. Civ. App. P., this point was waived by Appellant. See Schoepke v. Alexander Smith & Sons Carpet Co., 290 Minn. 518, 187 N.W.2d 133 (1971); Lowe v. Patterson, 265 Minn. 42, 120 N.W.2d 313 (1963); Johnson v. Quaal, 250 Minn. 154, 159, 83 N.W.2d 796, 800 (1957).

The members of the substitute panel invited the permanent judges of the Minnesota Supreme Court to state, for the record, the manner in which the appointments had been made, so as to dispel Appellant's factually baseless claims of "private or discretionary appointment"

by the disqualified justices of the Supreme Court. The permanent judges responded with a Statement by the Court, dated May 8, 1974, in which the system used to select substitute judges was set forth on the record.[7] This memorandum and order, together with the subsequent Statement by the Court, represented the Minnesota Supreme Court's decision of the factual issues of judicial bias and interest asserted by Appellant. In disposing of this Motion, the court did not decide, nor was it required to decide, the federal questions which Appellant claims to have raised. As will be more fully discussed below, this does not constitute a decision by the Minnesota Supreme Court of any federal question, but rather represents an essentially factual determination of a state law issue, and therefore constitutes adequate and independent state grounds for decision of the Motion. For all that appears in the record, the substitute Supreme Court proceeded without any substantial claim that the decision of any federal question was either desired or necessary.

In addition to the foregoing, Appellant also relies upon his alternative request in the same Motion below which asked that the members of the substitute panel declare "null and void" Chapter 18, Laws of Minnesota (1973). A review of Appellant's moving papers discloses that no federal question or federal grounds were offered in connection with this request. Appellant next

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7/ It was subsequently stated for the record that the system had been implemented "by Robert J. Sheran as Chief Justice of the said Supreme Court . . . ." See Order dated March 21, 1975.

turns to the Affidavit of Prejudice filed on May 8, 1974 against all nine substitute members of the Minnesota Supreme Court. Again, an examination of this document discloses that no federal question was properly raised. Rather, Appellant continued his vague allusions to civil rights and constitutional rights under both state and federal constitutions. While Appellant also directs this Court's attention to his second Motion to Dismiss, filed on May 15, 1974, he apparently does not contend that the federal questions which he now seeks to present were put to the Minnesota Supreme Court at that time, for the Motion dealt specifically with Appellant's theories that Appellees herein had waived their right to any appeal to the Minnesota Supreme Court and that briefs filed on their behalf before that court were defective. Moreover, Appellant expressly stated in his Motion that it was being made without constituting "a waiver" of his "constitutional objections" to the hearing of the appeal by the substitute panel. [Motion, p. 4]. Obviously then, Appellant did not intend by this Motion to present the question of any federal Constitutional infirmity in the proceedings.

Appellant finally cites his Petition for Rehearing before the Minnesota Supreme Court. Under Rule 140, Minn. R. Civ. App. P., the Petition for Rehearing is to be used to set forth "any controlling statute, decision or principle of law, any material fact, or any material question in the case which, in the opinion of the petitioner, the Supreme Court has overlooked, failed to consider, misapplied, or misconceived." The Rule is a codification of the decision of the Minnesota Supreme Court in Derby v. Gallup, 5 Minn. 85 (1860), in which the court held that rehearing will be granted only upon a showing that manifest error has been committed or that the case was not fully argued on appeal. 3 Hetland & Adamson,

Minnesota Practice, pp. 604-605 (1970). Far from asserting any new questions concerning the federal Constitutional validity of the subject statute, Appellant merely renewed his conclusory allegations of judicial bias, prejudice and misconduct by the substitute panel as set forth in his earlier motions. In his rehearing Petition, Appellant took the position that "a review of the sordid details of the deprivation of the respondent's [Appellant's] civil rights by those acting for and on behalf of the influential defendants would be redundant." [Petition for Rehearing, p. 63 (emphasis added)]. Appellant's inclusion in his Petition of a lengthy syllabus of judicial quotations concerning the meaning and history of constitutional due process of law does nothing to support his claim that the questions presented in his Jurisdictional Statement here were properly presented to the court below by his Petition for Rehearing. The order denying Appellant's Petition for Rehearing does not demonstrate the disposition of any federal question, but rather reflects Appellant's failure to show grounds for Rehearing.

In summary, a reading of the record does not disclose that any federal question was properly put to the Minnesota Supreme Court and most clearly establishes that none was decided or necessarily disposed of by that court's action. This appeal should therefore be dismissed.

II.

THE DECISION OF THE MINNESOTA SUPREME COURT RESTS UPON ADEQUATE AND INDEPENDENT NON-FEDERAL GROUNDS.

The "decision" of the Minnesota Supreme Court of which Appellant seeks review by this Court was the temporary panel's action in hearing and deciding the appeal of the trial court judgment

below. All of the various affidavits, motions and petitions filed by Appellant were designed to prevent a hearing of the appeal and had as their theme Wild's contention that the members of the panel were disqualified because of bias, prejudice and interest and because of the allegedly prejudicial circumstances of their appointment.[8] In denying these motions, the panel determined that Appellant had failed to establish any grounds for disqualification of its members and then clarified the method of their appointment to dispel Appellant's factually baseless assertions. [See Order filed May 6, 1974 and Statement by the Court filed May 8, 1974]. In so acting, all that was decided was the question of the sufficiency of Appellant's allegations and proof of judicial bias or interest. No decision of any federal question was made, nor was any required.

Rule 63.03, Minn. R. Civ. P., providing for the disqualification of trial court judges upon the mere filing of an affidavit of prejudice, was not applicable to the supreme court justices in the instant case. Therefore, in seeking to disqualify the entire membership of the temporary panel, Wild assumed the burden of making an affirmative evidentiary showing of prejudice. See Prior Lake State Bank v. Mahoney, 298 Minn. 567, 216 N.W.2d 681 (1974); Baskerville v. Baskerville, 246 Minn. 496, 75 N.W. 2d 762 (1956). Thus, Appellant's conclusory factual allegations

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[8] Perhaps the best précis of the arguments repeated by Appellant throughout the proceedings below appears in the memorandum opinion of Judge Neville in Wild v. Knutson, Civil No. 4-73-473 (D. Minn., filed Dec. 13, 1973), appeal dismissed, No. 74-1137 (8th Cir., filed June 13, 1974).

of bias were not sufficient. Moreover, his allegations of "interest" on the part of certain panel members because of alleged prior connection with the St. Paul Companies was legally insufficient to establish grounds for disqualification.[9] Finally, the Statement by the Court concerning the appointment of the substitutes conclusively rebutted Appellant's baseless accusations of manipulation and discretionary selection by disqualified judges. As that Statement makes clear, the "selections" were made pursuant to a neutral system resulting in the participation of the chief judge (or the next most senior judge available) from each of the state's judicial districts except the district within which the Appellee charitable foundations are established. These judges were then appointed by order of the

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[9] See Wickoff v. James, 159 Cal.2d 664, 324 P.2d 661 (1958); State v. City of Mobile, 248 Ala. 467, 28 So.2d 177 (1946); Keeffe v. Third National Bank, 177 N.Y. 305, 69 N.E. 593 (1904).

> The disqualification of a judge as counsel or former counsel to a party is limited to parties with whom he has been in an attorney and client relationship and to cases with respect to which he has acted as counsel. [Emphasis added.]

48 C.J.S. Judges § 83(2), p. 1065 (1947). Only such interests as are direct, immediate and certain will disqualify a judge. State Bar Ass'n v. Divorce Educ. Associates, ___ Minn. ___, 219 N.W.2d 920, cert. denied, 419 U.S. 1023 (1974); Goodman v. Wis. Elec. Power Co., 248 Wis. 52, 20 N.W.2d 553, 162 A.L.R. 649 (1945); Cuyamaca Water Co. v. Superior Court, 193 Cal. 584, 226 P. 604, 33 A.L.R. 1316 (1924).

Chief Justice. [See Order filed March 21, 1975].10/ Appellant failed to show any grounds, factual or legal, for the relief requested, and there can be no question as to the propriety under state law of the panel's refusal to disqualify itself. Clearly then, the decision of the Minnesota Supreme Court rejecting Appellant's demands for disqualification rested upon fully adequate state grounds.

It is a rule of long standing that the Court will not review the judgment of a state court which is based upon adequate and independent nonfederal grounds. Herb v. Pitcairn, 324 U.S. 117, 125 (1945); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Berea College v. Kentucky, 211 U.S. 45 (1908). Indeed, in the absence of an opinion by the state court, if it appears that the judgment might have rested upon nonfederal grounds, this Court will decline jurisdiction. Stembridge v. Georgia, 343 U.S. 541, 547 (1952); Woods v. Nierstheimer, 328 U.S. 211 (1946). Any ambiguity as to the presence of adequate state grounds supporting the judgment will be resolved

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See 46 Am. Jur.2d Judges § 99, p. 163 (1969). The interest must be one which is presently in existence. Id., § 100, p. 164.

10/ Under Minnesota law, the selection of substitute judges has long been recognized as a proper judicial function. See State ex rel. Thompson v. Day, 200 Minn. 77, 273 N.W. 684 (1937); State ex rel. Decker v. Montague, 195 Minn. 278, 262 N.W. 684 (1935).

by refusing jurisdiction. See Black v. Cutter Laboratories, 351 U.S. 292 (1956); Durley v. Mayo, 351 U.S. 277 (1956); Phyle v. Duffy, 334 U.S. 431 (1948). In the instant case, the presence of nonfederal grounds which independently support the denial of Appellant's requests for disqualification is clear. Appellant failed to make the factual showing required to obtain such relief and, at least in the case of his claims of "interest," even his unfounded factual allegations were legally insufficient.

It is likewise evident that the decision of the Minnesota Supreme Court in the instant case was, in essence, the resolution of a question of fact. As noted above, Appellant was required to make an affirmative evidentiary showing of bias or prejudice in order to disqualify the members of the temporary panel. Appellant failed to present evidence of any kind to establish his broad allegations. Under Minnesota law, the question of judicial bias, prejudice or interest is an issue of fact. See Payne v. Lee, 222 Minn. 269, 271, 24 N.W.2d 259, 262 (1946); State ex rel. Decker v. Montague, supra at n. 11; cf. Friedman v. Goffstein, 182 Minn. 396, 234 N.W. 596 (1931). The Order of May 6, 1974, its accompanying memorandum, and the Statement by the Court represent a decision against Appellant on the factual questions of judicial bias and prejudice which he sought to raise. This Court does not ordinarily review findings of fact made by state courts. Fry Roofing Co. v. Wood, 344 U.S. 157 (1952); Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 294, reh. denied, 312 U.S. 715 (1941); Grayson v. Harris, 267 U.S. 352, 358 (1925); see also Note, Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases, 14 Stan. L. Rev. 328, n. 1 (1962). No basis for a departure from this rule

is present in the instant case. Because the decision below rests upon adequate grounds, and because it represents the resolution of a question of fact, this appeal should be dismissed.

III.

THERE IS NO SUBSTANTIAL QUESTION AS TO THE VALIDITY OF MINN. STATS. § 2.724, SUBD. 2 (1974) AS APPLIED IN THIS CASE UNDER EITHER THE DUE PROCESS CLAUSE OR THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This Court has consistently held that jurisdiction under 28 U.S.C. § 1257(2) cannot be maintained if an appellant fails to present a substantial federal question. See, e.g., Roe v. Kansas, 278 U.S. 191, 192 (1929); Zucht v. King, 260 U.S. 174, 175 (1922); Sugarman v. United States, 249 U.S. 182, 184 (1919). In the instant case, the federal claims which Appellant purports to present are patently unsubstantial, and therefore jurisdiction under 28 U.SC. § 1257(2) is lacking.

Minn. Stats. § 2.724, Subd. 2 (1974), provides, in pertinent part:

> Any number of justices may disqualify themselves from hearing and considering a case, in which event the Supreme Court may assign temporarily a retired justice of the Supreme Court or a district judge to hear and consider the case in place of each disqualified justice.[11/]

11/ Minn. Const. art. VI, § 2, as amended in 1972, provides that district court judges may be assigned to act as temporary justices of the supreme court "as provided by law." Minn. Stats. § 2.724, Subd. 2 (1974) simply implements this constitutional provision.

Appellant rests upon the bald assertion that the application of this provision in the subject action constituted a denial of due process and equal protection, without providing any supporting analysis or citing a single relevant case. Appellant merely lists several cases which allegedly provide the basis for jurisdiction [Juris. Stmt., p. 5], but does not explain or illustrate their applicability. In fact, none of these cases are related in any way to the issue of the appointment of substitutes by disqualified judges.

Because Appellant does not explain precisely in what manner the application of this statute was allegedly unconstitutional, it is difficult to respond to his conclusory contention. However, assuming that his argument relates to the manner in which the substitute justices were selected, such a claim is without substance. Indeed, the method of selecting replacement justices employed in the instant case is remarkably similar to methods used by other state supreme courts in those rare instances when each justice found it necessary to recuse himself. In State Board of Law Examiners v. Spriggs, 61 Wyo. 70, 155 P.2d 285, cert. denied, 325 U.S. 886 (1945), a court composed of three district court judges recommended to the state supreme court that respondent Spriggs be disbarred. The basis for this recommendation was that Spriggs had made

certain false, contemptuous and scandalous charges against the state supreme court when he was a candidate for the office of justice of that court, one of the incumbent members of the court being his opponent.

All three supreme court justices declined to hear the matter on appeal and called in three other district court judges to hear the matter.[12] This was done pursuant to provisions of the Wyoming Constitution empowering the presiding justice to "call" district judges to serve as temporary members of the supreme court. Wyo. Const. art. V, § 6.

The supreme court, composed of the temporary justices, rejected Spriggs' objection to their assumption and exercise of jurisdiction:

> This is the first time in the history of this court that it has become necessary to call in three district judges to fill the places of the three supreme court justices . . . .
>
> We believe that this constitutional provision contemplates the calling in of a district judge to take the place of each justice who shall for any reason be unable to sit. Thus if one, two or three justices for any reason think they should not sit in a case, each place is filled by a district judge who is called in by the Chief Justice.

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[12] There were seven district court judges in the state. The three that had heard the matter in the district court were disqualified, one other also disqualified himself, and the remaining three heard and decided the matter on appeal. 61 Wyo. at 76, 155 P.2d at 281.

> The constitutional provision was adopted to expedite the disposition of cases in this court, and also to provide a full panel to hear and determine litigation if any one or more justices were ill or for any reason felt he or they should not sit. The objection to the jurisdiction of this court as composed is overruled.

Id. at 76-77, 155 P.2d at 287.[13]

A similar procedure for selecting replacement justices was employed in Kekoa v. Supreme Court, 53 Haw. 174, 488 P.2d 1406 (1971). In that case, each supreme court justice recused himself from hearing the case. The issue concerned the proper method of appointing replacements. The appellants requested that this be done by drawing lots. The court rejected this proposal, finding that the state constitution called for the appointments to be made by the chief justice himself.

In the later decision on the merits, Kekoa v. Supreme Court, 55 Haw. 104, 516 P.2d 1239, cert. denied, 417 U.S. 930 (1973), the reasons for the recusal of each justice were stated. The justices of the state supreme court, acting pursuant to the provisions of a will, had appointed the trustee of an estate. A civil suit

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[13] The Spriggs case also indicates that, even absent Minn. Stats. § 2.724, Subd. 2 (1974), the Minnesota Supreme Court had the full power and duty to appoint substitute justices to sit in its place. This conclusion also follows from the rule that, in no event, shall judicial bias be allowed to destroy the only

was brought challenging that appointment, and the trial court dismissed the action. Plaintiffs appealed from the dismissal and brought a motion seeking the disqualification of the entire supreme court. All of the justices recused themselves. In deciding the case, the replacement judges found that their appointment had been entirely proper, stating, "We take judicial notice of the fact that the provisions of Article V, § 2 [Hawaii Constitution] are frequently implemented, precisely in order to avoid any appearance of impropriety." Id. at 114, 516 P.2d at 1246.

The above cases, which closely parallel the instant action in the reasons for disqualification of the regular justices and the constitutional provisions for appointment of temporary justices, indicate that when each justice of a state supreme court finds it appropriate to recuse or disqualify himself, it is entirely proper for the supreme court itself to appoint temporary justices to sit in its place. In fact, rather than constituting a denial of due process or equal protection, such methods are employed to avoid even the "appearance of impropriety" Kekoa, supra, 55 Haw. at 114, 516 P.2d at 1246, and to "provide a full panel to hear and determine litigation," Spriggs, supra, 61 Wyo. at 76-77, 155 P.2d at 287. The systematic method employed in the instant case, chosen to obtain a representative panel of experienced judges, is consistent with notions of due process, and was unquestionably correct as a matter of statutory, as well as state and federal constitutional law.

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tribunal in which relief can be had and thereby prevent a determination of the proceedings. See 46 Am. Jur.2d Judges, § 89 (1969) and cases cited therein. The rule of necessity has been specifically adopted in Minnesota. State ex rel. Gardner v. Holm, 241 Minn. 125, 62 N.W.2d 52 (1954).

In addition to being consistent with procedures adopted by other state supreme courts in similar situations, the method employed in selecting temporary justices in this case is unquestionably consistent with prior Minnesota decisions and practices. In In re Daly, 294 Minn. 351, 200 N.W.2d 913, cert. denied sub nom. Daly v. McCarthy, 409 U.S. 1041 (1972), three disbarred attorneys and a non-lawyer were declared ineligible to be candidates for judicial office in an original proceeding before the Minnesota Supreme Court. Associate Justices of the Supreme Court C. Donald Peterson and Fallon Kelly, whose offices were being sought by two of the disbarred attorneys, took no part in the consideration of the case. A retired associate justice of the court and a district court judge were appointed by the court to replace the disqualified judges in hearing the case. Id. at 363, 200 N.W.2d at 920.

In Peterson v. Knutson, Minn. No. 45333, Finance and Commerce, August 12, 1975, at 6, col. 1, one of the three disbarred attorneys in the Daly case, supra, brought suit against the justices of the Minnesota Supreme Court for damages of $750,000, claiming to have been injured by the participation of any permanent justices in the decision of In re Daly, supra. The plaintiff also named Associate Justices Peterson and Kelly as defendants, alleging that they had wrongfully influenced the decision.

The trial court granted summary judgment for all defendants, and plaintiff appealed to the Minnesota Supreme Court. The justices who were defendants recused themselves, and district judges were selected to hear and decide the case as justices of the supreme court by appointment pursuant to Minn. Const. art. VI, § 2 and Minn. Stats. § 2.724, Subd. 2 (1974).

Other Minnesota cases have indicated that a disqualified judge may perform those functions, including the appointing of a substitute judge, which are necessary to secure determination of the case. In State ex rel. Thompson v. Day, 200 Minn. 77, 273 N.W. 684 (1937), the court noted:

> The matter of selecting the substitute judge pertains to the everyday, routine management of the courts and therefore is a judicial function. Hence, it cannot be delegated to the executive department.

Id. at 82, 273 N.W. at 686.

Similarly, in State ex rel. Decker v. Montague, 195 Minn. 278, 286, 262 N.W. 684, 688 (1935), the court noted that appointing a substitute judge when the regular judge is disqualified is generally a judicial duty. A final example of such reasoning is found in Minnesota State Bar Ass'n v. Divorce Ed. Associates, ___ Minn. ____, 219 N.W.2d 920 cert. denied, 419 U.S. 1023 (1974), when the court quoted with approval the following language from 46 Am. Jur.2d Judges § 230 (1969):

> Thus, the disqualification of a judge to hear and determine a cause does not prevent him from making orders that are purely formal in character. . . . He may make such formal orders as are necessary to the maturing or the progress of the cause, or to bring the suit to a hearing and determination before a qualified judge, or another court having the jurisdiction . . . .

___Minn. ___, 219 N.W.2d at 921 (emphasis supplied by court).

Appellant's heavy reliance on Payne v. Lee, 222 Minn. 269, 24 N.W.2d 259 (1946) [Juris. Stmt, p. 5], is misplaced, for the subject matter of that case is related to the circumstances under which a judge should disqualify himself, and does not specifically discuss the appropriate method of selecting a substitute judge after disqualification. In fact, the Payne court quoted with approval Minn. Stats. § 525.051, which then provided in pertinent part:

> When the disqualification . . . of the resident judge exists, . . . any other judge may act upon the request of the resident judge . . . .

222 Minn. at 272, 24 N.W.2d at 262 [emphasis added]. The court thus recognized that the appointment of a substitute judge by the disqualified judge was entirely proper.

Many cases in various other jurisdictions have similarly held that the appointment of a temporary judge by the disqualified judge does not constitute a denial of due process or equal protection. In State v. Day, 506 S.W.2d 497 (Mo. App. 1974), the trial judge in a criminal matter disqualified himself, and appointed a substitute judge to sit temporarily in his place. The defendant argued that such a procedure was a denial of due process under the Missouri and United States Constitutions, claiming that "[I]f a judge who has been disqualified is permitted to appoint his successor, the bias of the judge carries over to his successor." Id. at 499. The court summarily rejected this contention, stating that "The propriety of this procedure has been consistently approved, and it was proper

here." Id. at 499.[14] The claim made by Appellant in the instant case, that the alleged bias of the justices of the Minnesota Supreme Court would somehow carry over to the replacements, is equally without merit, and does not pose a substantial federal question.

In Stringer v. United States, 233 F.2d 947 (9th Cir. 1956), the court similarly recognized the power of a disqualified judge to appoint a substitute:

> [O]nce having disqualified himself for cause, on his own motion, it was incurable error for the district judge to resume full control and try the case . . . . This is not to suggest that a trial judge after disqualifying himself cannot with propriety carry on the mechanical duties of transferring the case to another judge or other essential ministerial duties short of adjudication.

Id. at 948. Several other jurisdictions have recognized this principle, and have upheld the authority of a disqualified judge to appoint his replacement. See, e.g., Williams v. Widows and Orphans Home, 140 Mont. 259, 373 P.2d 948 (1962); Fuller v. Gibbs, 122 Mont. 177, 199 P.2d 851 (1948); Pincus v. Pincus' Estate, 95 Mont. 375, 26 P.2d 986 (1933); Hordyke v. Farley, 94 Ariz.

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[14] In Rowland v. State, 213 Ark. 780, 798-800, 213 S.W.2d 370, 381-82 (1948), cert. denied sub nom., Rowland v. Arkansas, 336 U.S. 918, reh. denied, 336 U.S. 941 (1949), the court similarly indicated that where a disqualified judge appointed his replacement, the alleged bias of the disqualified judge did not attach to his appointee.

189, 382 P.2d 668 (1963); Garland v. State, 110 Ga. App. 756, 140 S.E.2d 46 (1964); Hooks v. State, 207 So.2d 459 (Fla. 1968); Bloodworth v. State, 160 Ga. 197, 127 S.E. 458 (1925); Ex Parte Burch, 168 Cal. 18, 141 P. 813 (1914); Winn v. Eatherly, 187 Miss. 159, 192 So. 431 (1939). Other courts have explicitly recognized the affirmative duty of a disqualified judge to appoint his replacement. See, e.g., Allen v. State, 102 Ga. 619, 626-27, 29 S.E. 470, 473 (1897); Dupriest v. Reese, 104 Ga. App. 805, 806, 123 S.E.2d 161, 162 (1961).

Against the weight of this authority, Appellant does not provide a single case which in any way suggests that the method of selecting the substitute justices in the instant action was not proper, and nothing has been offered which even indicates that there has been a denial of due process, equal protection or any other federally protected Constitutional right.

The fact that Appellant has failed to present a substantial federal question has previously been recognized by a federal court. Wild v. Knutson, Civil No. 4-73-473 (D. Minn., December 13, 1973). In that action, Appellant sought to convene a three-judge federal court to consider the constitutionality of the state statute and to enjoin the appeal from the trial court judgment to the state supreme court. The late Judge Phillip Neville denied this relief, and dismissed the action for failure to state a claim. In the accompanying memorandum, he characterized Appellant's claims as follows:

> He alleges that the Minnesota statute permitting appointment of replacements is unconstitutional, at least as applied to this case, and that he is denied due process in that

he cannot and will not, under any circumstances he claims, receive a fair trial on appeal . . . .

Coming first to the constitutionality of the statute re appointing replacements which seems to this court to be the only possible federal question that could be raised. Facially the statute is clearly valid. It is a procedural direction or authorization from the legislature to the court and cannot be said to suffer from overbroadness, or discriminatory provisions, or lacking due process, or violating some specific federal constitutional provisions, some of the conventional attacks that normally are leveled at state statutes. On the question of whether this statute, valid on its face, is somehow unconstitutional as applied to Dr. Wild's case, the obvious thing that can be said is that he hasn't yet been hurt, if at all. For all that this court knows his state court judgment may be affirmed by the replacement judges. He seems to doubt this however and to urge that the statute permitting appointment of replacements is inherently evil, apparently on the theory that the district judges to be appointed - whomsoever they may be - will in some way owe a fealty to the Supreme Court or will be persuaded or brainwashed to make such decision as the Supreme Court may direct and thus will be prejudiced against him. Following this premise in effect he asks this court to hold that all Minnesota State District Judges in excess of 70 in number, are

prejudiced and biased against his cause and that any of them selected cannot and would not be fair and impartial. Such a premise is ridiculous. In reality this court need not consider whether the challenge to the statute is unconstitutionality per se or merely as applied. In either event the challenge has no merit and does not warrant the convening of a three-judge federal court.

[Memorandum, pp. 3-4]. Appellant's appeal from Judge Neville's opinion was summarily dismissed as "legally frivolous" and "entirely without merit" by the Eighth Circuit Court of Appeals. Wild v. Knutson, No. 74-1137 (8th Cir., June 13, 1974).

In denying Appellant's motions, Judge Neville also relied, in part, on the fact that the challenge to the application of the statute was then premature. However, with the exception of additional conclusory allegations of bias and prejudice, the record remains completely devoid of any evidence to suggest that Appellant's constitutional rights were eventually impinged in the replacement process. Therefore, Judge Neville's conclusion that Wild's challenge is "conclusory," without merit and unsubstantial [Memorandum, pp. 4-5.] remains accurate, and provides reasoned authority for the view that the jurisdiction of this Court should not be exercised.

CONCLUSION

For all of the reasons stated above, Appellees respectfully urge this Court to

dismiss this appeal.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-927

JOHN J. WILD, M. D.,

Appellant,

vs.

FRANK M. RARIG, MINNESOTA FOUNDATION,
a Minnesota nonprofit corporation,
and AMHERST H. WILDER FOUNDATION,
a Minnesota nonprofit corporation,

Appellees.

APPELLANT'S RESPONSE TO MOTION TO DISMISS

JAMES MALCOLM WILLIAMS
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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-951

JOHN J. WILD, M. D.,

Appellant,

vs.

FRANK M. RARIG, MINNESOTA FOUNDATION,
a Minnesota nonprofit corporation,
and AMHERST H. WILDER FOUNDATION,
a Minnesota nonprofit corporation,

Appellees.

APPELLANT'S RESPONSE TO MOTION TO DISMISS

I. Introduction

Just as the appellees did everything in their rather awesome "power" to prevent a fair and impartial appellate decision on the merits before the Minnesota Supreme Court and its companion panel by employing the professionally

distasteful "ol' boy fraternity brother" techniques, (See Resp. Brief and Petition for Rehearing) so, too, the "motion to dismiss" resorts to essential fallacy and subjective terminology to avoid the issues, the facts and the merits. (Former members of the appellees' law firm and the "Otis" law firm are now on this Court. No mention of this fact appears in the motion either.)

The issue is whether or not the appellee was deprived of his constitutional right to due process and equal protection of the law by the enactment and application of the legislation involved.

The merits are clear - the appeal below was a shocking constitutional mockery. Dr. Wild was intentionally deprived of equal protection and due process in an appellate proceeding which was obviously "controlled" in every essential in favor of the appellees. (e.g., "Misconduct" on the part of appellees' [defendants below] attorney is rewarded with a new trial. Thus, in Minnesota, a defendant who is losing a lawsuit on the merits can avoid the loss by having his lawyer commit mis-

conduct.)

The facts constituting this travesty are completely ignored in appellees' motion. The ludicrous claim is made at Page 15, that "facts" constituting constitutional deprivation cannot be considered by the United States Supreme Court and in some mystical way are somehow the exclusive property of the states.

This answer would be unduly prolonged if we reviewed all the facts. We, however, suggest you review Mr. Graham's affidavit appended hereto as well as the quotation from Dr. Wild's allegations under oath relative to criminal conspiracy surrounding the enactment of Chapter 18 (Minn. Stats. 2.724, Subd.2 [1974] - See Appendix I.)

It is of considerable importance that the appellees' motion to dismiss completely ignores the activities of the Minnesota Supreme Court which led to the passage of the legislation in near-record time as a piece of "routine Judicial Administration". (See Appendix II re: some of those circumstances.)

II. Argument

The contentions (1) Evasion (i.e., Matter not presented or ruled on below); (2) Irrelevance (i.e., No real federal constitutional question material to decision below); and, (3) Triviality (i.e., Even if there is a constitutional question, it is so trivial that the United States Supreme Court should ignore it), are at best gross subjectivisms contrary to the law and facts cited in the Jurisdictional Statement.

Using sophistry, gross oversimplifications, avoidance of fact and fundamental law, perversion of the record (e.g., Page 3, ". . . ancient wills . . . "), and the significance of the record below (e.g., ". . . all of the various affidavits, motions and petitions filed by appellant were designed to prevent a hearing of the appeal . . . "), are used by the appellees to the end that mere verbosity and conventional legalistic jargon become a complete substitute for facts, principles and logic. (See Temporary Court Decision below, Appendix to

Jurisdictional Statement, itself another "paragon of artificial pettifoggery"). This Court is subjected to a man-made blizzard of irrelevant citations designed to blind one to justice, to reason and to the facts.

For instance:

(1) The appellees do not even make a nude claim that the appellant had due process and equal protection below -- for they know it is not so and the record proves it;

(2) The appellees do not claim that the temporary panel was qualified to decide the appeal for the panel was clearly prejudiced and handpicked to carry out the wishes of the permanent court;

(3) The appellees do not even claim that the decision below was fair and impartial for the decision <u>proves</u> the extreme prejudice of the panel. (See Petition for Rehearing) The appellees refusal to discuss the opinion below in their motion is a <u>tacit</u> admission of gross federal constitutional depri-

vation; and,

(4) The appellees also completely ignored the corollary issues which are of such great import to the administration of appellate justice.

It is difficult to conceive of a situation in which an appellant could have done more to give both appellate courts below the opportunity to face the federal constitutional issues. They certainly decided them either directly or by outright refusal. (See Jurisdictional Statement.) The allegation, in effect, that equal protection and due process in appellate proceedings is so trivial as to warrant this court's judicial indifference is without rational support. Equally, the suggestion that the constitutional matters are irrelevant to the decision below is unsupported. These bald assertions are in the nature of authoritarian edicts which require no law, principle or reasoning. There is nothing whatsoever in the appellees' motion that lends factual or constitutional justice in support of these autocratic

pronouncements.

Dr. Wild feels strongly that if this Court adopts the appellees' unsubstantiated subjective concepts of evasion, irrelevance or triviality as a device to avoid the responsibility to hear this important and meritorious matter, it will amount to a total and unjustified absquatulation from constitutional duty by the highest court of our land. It will entail a breakdown in the administration of justice in the Federal Judiciary at its highest level, comparable and analogous to that judicial failure that has already occurred in Minnesota.*

Dr. Wild stated that a failure to review would amount to allowing ". . . the practice of license without a law

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*It is interesting that the State of Minnesota Attorney General has adopted the appellees' motion (See Feb.2,1976 letter to Clerk Rodak): ". . . we do, however, agree with appellees' contention that the above-entitled appeal should be dismissed for the reasons set forth in the brief in support of their motion to dismiss."

. . ." on the part of the Minnesota Supreme Court.

Respectfully submitted,

JAMES MALCOLM WILLIAMS
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APPENDIX I

". . . defendants did willfully, wrongfully and unlawfully conspire, confederate and agree with each other to corruptly influence members of the Minnesota State Legislature by willfully, wrongfully and corruptly influencing the vote and performance of duties of members of the Legislature of the State of Minnesota, . . . by corrupt deception and corrupt concealment of facts from the aforesaid legislators in and as part of the Minnesota Supreme Court's recommendation and sponsorship of the legislation involved herein, including the following:

A. Concealment - The defendants and each of them, acting personally and through defendants Klein and Davies, did unlawfully and feloniously conceal:

1. The true nature and extent of the influence on the Minnesota Supreme Court of the St. Paul Companies and the Amherst Wilder Foundation inducing the Minnesota Supreme Court to falsely sponsor the legislation invol-

ved herein as routine judicial administration, to-wit: as delineated below.

2. The true nature and extent of the private financial interest in the proposed legislation of the St. Paul Companies and the Amherst Wilder Foundation inducing the Minnesota Supreme Court to falsely sponsor the legislation involved herein as routine judicial administration, to-wit: as delineated below.

3. The true nature and relevance of the legislation to specific pending litigation, also inducing the Minnesota Supreme Court to sponsor the bills as routine judicial administration, to-wit: Wild v. Rarig, Amherst Wilder Foundation and Minnesota Foundation, to wit: as delineated below.

4. The true nature and relevance of the legislation to the private financial interests of members of the Minnesota Supreme Court, to-wit:

a. Defendant Otis' substantial ownership of stock in the St. Paul Companies;

b. Defendant Otis' position as a Vice President and board member of

Amherst Wilder Foundation and Minnesota Foundation, defendants in Wild v. Rarig, Amherst Wilder Foundation and Minnesota Foundation;

c. The Supreme Court's interest in protecting the assets of Wilder as "visitors" of that organization (defined as protectors of [Wilder's] assets);

d. Defendant Justice Otis (as official and board member of Wilder);

e. Amherst Wilder's interest of over 65-million dollars (and as Visitors, the other defendant Justices of the Supreme Court) in protecting the assets of the St. Paul Insurance Companies;

f. Justice Otis' voting with other board members on behalf of Wilder Foundation, of over 650,000 shares of St. Paul Companies' stock;

g. That, therefore, Wilder, in effect, exercises substantial control over the St. Paul Companies (large insurance group involved as well with other cases and appearing

regularly before the said Supreme Court, said cases directly concerned with the financial interests of the said St. Paul Companies);

h. Therefore, Wilder, its officers, defendant Otis and Visitor-Trustees Knutson, Rogosheske, Peterson, Kelly, Todd and MacLaughlin, have personal private interests in protecting the assets of St. Paul Companies as well as those of Amherst Wilder;

i. That defendant Justice Otis had in fact testified in the relevant pending litigation (i.e., Wild v. Rarig, Wilder and Minnesota Foundations);

j. That by allowing the Supreme Court to appoint its own replacements in the pending litigation, the defendant-Justices of the Supreme Court herein could avoid public responsibility and exposure for their conflicts of interest, yet, still control the outcome of the appeal for their own benefits and the benefits of the St. Paul Companies and Amherst Wilder;

k. That there would probably be, and was, an appeal to the Minnesota Supreme Court in the Wild case of an over 16-million dollar verdict which would be in fact an appeal of the Supreme Court's own case to itself;

l. Affidavits of prejudice would, under the facts, undoubtedly be filed, and were filed, (including the personal associations of the Supreme Court members), which would and did require the entire court to disqualify itself; and,

m. That an appeal in the Wild case would, in effect, amount to the Supreme Court passing on its own appeal, and, therefore, the Court's appointing its own replacements would be unfair.

5. Did not disclose to the Legislature the ethical, legal and constitutional difficulty and improprieties in allowing a disqualified (i.e., prejudiced or personally interested) judge to appoint his own replacement and how this was minimized in the prior const-

itutional provision by having the governor or lt. governor appoint their replacements in the event of disqualification of the entire Supreme Court or a majority of its members.

6. Nature and extent district court judges are dependent upon the goodwill of Supreme Court both statutorily and situationally, e.g., (a) assignments after retirement for additional income, and, (b) Pro tempore assignments to serve on the Supreme Court when no disqualification is involved.

7. Did not disclose that the governor and lt. governor powers of appointment for disqualified judges had been taken from them in a recent amendment to the Minnesota Constitution where this provision was hidden from the voters (people) on the ballot.

B. Deception - the defendants and each of them acting personally and through the defendants Klein and Davies did unlawfully and feloniously deceive the aforesaid legislators as follows:

1. Represented that allowing the disqualified judges to appoint their own

replacements was only to reestablish an old constitutional provision where, in truth and fact, the governor or the lt. governor appointed the Supreme Court temporary replacements when a majority of the justices were disqualified under the Old Constitution for over 75 years.

2. Represented that the legislation (to-wit: House File 430, Senate File 3405, Chapter 18, Laws, 1973), was merely routine pro forma judicial administration legislation as an aid to concealing the true purpose of the bill and what it was really designed to do, to-wit:

a. Allow the Supreme Court to control its own appeal;

b. To protect the assets of the Amherst Wilder Foundation and the St. Paul (Insurance) Companies;

c. To prevent public hearings on the bills; and,

d. To prevent Dr. Wild or his lawyers from appearing before the committees and being instrumental in getting fair and constitutional

legislation passed, i.e., legislation that would insure a fair and impartial appeal panel, not one that would allow the personally-involved Supreme Court to control its own appeal all with the intent then and there entertained by the defendants and each of them to thereby corruptly influence the said legislators as designated above in respect to their vote and performance of their duty in this respect, to-wit: to vote for, recommend for passage and to pass House File No. 430 and Senate File No. 3405 in hasty and ill-considered fashion, without public hearing and notice to interested citizens and adequate and proper consideration by the said legislators of the ramifications of the legislation by the defendants presenting said bills. The defendants employed the false and fraudulent misrepresentation that the bills were routine judicial administration legislation when, in truth and fact, the said legislation was fraudulently designed to allow the

regular Supreme Court to control their own appeal as aforestated and to continue control of any other appeal when the Court or its members may be financially or otherwise personally interested by allowing the disqualified judges to appoint their own replacements at their personal discretion, all contrary to M.S.A. 609.425."

APPENDIX II

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1975
NO. 75-951

John J. Wild, M.D.,
Appellant,

-vs

Frank M. Rarig, et al.
Appellees.

AFFIDAVIT

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Your Affiant, JOHN REMINGTON GRAHAM, on solemn affirmation, deposes and says:

That he is a member of the Bar of the Minnesota Supreme Court, and of this Court. Your Affiant acted as junior counsel for Dr. Wild in this matter in the Minnesota District Court for Hennepin County and the Minnesota Supreme Court, but does not so act here, and has not actively participated in this matter for the better part of one year, due to pressing obligations elsewhere. This Affidavit has been prepared at the request of Mr. Williams to clarify

facts of public record in or related to this matter, so as to facilitate disposition of this Appeal.

While preparing for the anticipated Appeal of the Wilder Foundation to the Minnesota Supreme Court, your Affiant determined the following facts:

Under the Will of Amherst H. Wilder, executed in 1893, one-third of his estate went to his wife, Fanny Wilder; one-third went to his daughter, Cornelia Appleby, and one-third went to his testamentary trustees, who, as directed, established by incorporation the first Wilder Charity.

Under the Wills of Cornelia Appleby and Fanny Wilder, both executed in 1902, their estates went to their testamentary trustees, who as directed, established by incorporation the second and third Wilder Charities. The 29th Article of both of these latter instruments read, "I hereby earnestly request, and I hereby fully empower such persons (as individuals, however, and not as Judges) as may from time to time be acting Judges of the Supreme or highest court of

the State of Minnesota, to exercise frequently visitorial powers over the administration of this Fund and Charity . . . "

The merger of the three Wilder Charities was made possible by Chapter 222 of Minnesota Laws of 1909, which ordained that several charitable corporations could merge into one charitable corporation which would succeed to all of the "rights, powers, franchises, contracts, privileges, immunities, duties, liabilities, and obligations" of the original corporations. The merger of the three Wilder Charities was approved by state decree in equity, and effected by the incorporation of the Wilder Foundation.

Blackstone states that a visitor of an eleemosynary corporation has all the powers of the founder to see that the assets are rightly employed. 1 Bl. Com. 480-481.

In addition, it was made clear from disclosures at trial (in open court and chambers) that the Wilder Foundation owns 6 or 7 % of the capital stock of St. Paul Companies; that St. Paul Companies is the liability insuror of the Wilder Foundation; and that Justice James C. Otis is a vice president and trustee of the Wilder Foundation. It may be added that Justice Otis has been and apparently still is a holder of substantial stock in the St. Paul Companies.

Article VI, Section 3 of the Minnesota Constitution, as amended in 1876, provided "District judges may act where supreme court judges are disqualified. Whenever all or a majority of the judges of the supreme court shall, from any cause, be disqualified from sitting in any case in said court, the governor, or, if he shall be interested in the result of such case, then the lieutenant governor, shall assign judges of the district court of the state, who shall sit in place of such disqualified judges, with all the powers and duties of judges at the supreme court."

Minnesota Statutes, Section 542.13, which dates back to territorial days, defines judicial disqualification as follows, "No judge shall sit in any cause . . . if he be interested in its

determination, or if he might be excluded for bias from acting therein as a juror."

By amendments in 1956 and 1972, the old Article VI, Section 3 of the Minnesota Constitution was displaced by a new Article VI, Section 2, which reads, "Judges of the district court may be assigned as provided by law temporarily to act as judges of the supreme court on its request."

On March 9, 1973, shortly after the Appeal of the Wilder Foundation to the Minnesota Supreme Court, was filed, Chapter 18 of Minnesota Laws of 1973 was promulgated. The statute provides, "Any number of justices may disqualify themselves from hearing and considering a case, in which event the supreme court may assign temporarily a retired justice of the supreme court or a district judge to hear and consider the case in place of each disqualified justice."

In late February and early March of 1974, your Affiant investigated the legislative history of the statute. The bills which eventuated in the enactment

were introduced in the Minnesota Legislature, at the request of the Minnesota Supreme Court, on February 2, 1973, as House File No. 430 and Senate File No. 400. According to legislative minutes, the bills were discussed in the Senate Subcommittee on Judicial Administration on February 6, 1973; the House Committee on the Judiciary on February 8, 1973; and the Senate Committee on the Judiciary on February 13, 1973.

A tape recording of the hearing on Senate File No. 400 in the Senate Subcommittee on Judicial Administration, on file with the Secretary of the Minnesota Senate, reveals that the bill was advocated by Senator Jack Davies, Chairman of the Senate Committee on the Judiciary. Following initial desultory discussion, Richard E. Klein, Esq., Administrator of the Minnesota Supreme Court, was introduced to explain the bill. He was covertly told not to be "too specific" by Senator Davies, whose words are nevertheless audible on the tape. Mr. Klein mentioned nothing of the Appeal of the Wilder Foundation to

the Minnesota Supreme Court. He did say that before 1956, the Minnesota Constitution empowered the Minnesota Supreme Court "to replace itself" when necessary. The bill, he said, would simply restore this self-replacing power, which had been inadvertantly expunged in 1956, although he mentioned nothing of the old provision in the pre-1956 state constitution giving the governor or lieutenant governor that power. On this imperfect information, the subcommittee approved the bill, in the form eventually enacted, giving disqualified justices the power of self-replacement.

When your Affiant sought to listen to a tape recording of the hearing on House File No. 430, he was given a tape contained in a box marked "H.F. No. 430 2/8/73 R.J.P." But this tape does not disclose what occurred: there is some miscellaneous material, and then a long blank, suggesting the possibility of erasure. The minutes of the House Committee on the Judiciary do indicate, however, that Mr. Klein appeared to explain

the bill.

All other legislative records reveal that passage of House File No. 430 and Senate File No. 400 into Chapter 18 of Minnesota Laws of 1973 was thereafter routine and uneventful. No notice of any legislative hearings was ever given Dr. Wild until after the fact. See the Memorandum of the Minnesota Supreme Court. February 21, 1973, refusing recusation initially; and Letter of Mr. McCarthy to Mr. Williams, March 12, 1973, stating that the permanent Justices had recused themselves en banc pursuant to Chapter 18 of Minnesota Laws of 1973.

Subsequently, in the same year, Dr. Wild brought suit in the United States District Court for Minnesota seeking equitable supervision of the process of selecting the temporary Justices of the Minnesota Supreme Court in the Appeal of the Wilder Foundation, so as to preclude the secret and personal discretion of any fiduciary of the Wilder Foundation. Wild v. Knutson, et al., D. Minn. No. 4-73 Civ. 473, aff'd 8th Cir. No. 74-1137.

By January, 1974, it was apparent to your Affiant, that a major ethical crisis in the judiciary of his State might well erupt, very much against the public interest and possibly harmful to the reputations of blameless persons, unless a prompt solution were found. After obtaining permission of Mr. Williams and Dr. Wild to seek such an accommodation as a private citizen, your Affiant approached State Senator Winston Borden, representing the district wherein your Affiant is domiciled, just before the opening of the 1974 Session of the Minnesota Legislature. The following letter from your Affiant to Senator Borden, written after initial oral conversation, is self-explanatory:

"January 31, 1974
Hon. Winston Borden
Minnesota State Senate
State Capitol Building
St. Paul, Minnesota 55101

Dear Senator Borden:

This is to confirm our appointment for dinner on Tuesday, February 5, 1974, at which time I propose to discuss with you ameliorative legislation concerning judicial administration. Be advised that I have registered with the Secretary of the Senate.

Article VI, Section 3, of the Minnesota Constitution as amended in 1876, reads: "District judges may act where supreme court judges are disqualified. Whenever all or a majority of the judges of the supreme court shall, from any cause, be disqualified from sitting in any case in said court, the governor, or, if he shall be interested in the result of such case, then the lieutenant governor, shall assign judges of the district court of the state, who shall sit in place of such disqualified judges, with all the powers and duties of judges of the supreme court." This provision remained on the books until amendments in 1956 and 1972, causing the Minnesota Constitution now to read, in Article VI, Section 2: "Judges of the district court may be assigned as provided by law temporarily to act as judges of the supreme court upon its request."

When the case of Wild v. Rarig, et al. was appealed, the plaintiff-respondent sought to have the judges of the Supreme Court disqualified on a variety of grounds, which need not be labored here: Suffice it to say that his grounds include the present Chief Justice and Justices Yetka and Scott, and are not limited to formal cause only. The court, as then composed, refused to file his affidavits of prejudice. Acc-

ordingly he sought to file formal motions for recusation of the whole court, supported by detailed affidavits and exhibits.

A few days before his motions were filed, the Legislature, at the request of the Supreme Court, enacted Chapter 18 of the Laws of 1973, which reads, as an amendment to Section 2.724, Subdivision 2, of Minnesota Statutes of 1971: "Any number of justices may disqualify themselves from hearing and considering a case, in which event the supreme court may assign temporarily a retired justice of the supreme court or a district judge to hear and consider the case in place of each disqualified justice." This was done routinely, without hearing or debate, and without notice to any interested party except the Supreme Court.

He was then advised that the whole court had disqualified themselves pursuant to the new statute, and would in due course appoint their replacements. Immediately he inquired what method would be used to appoint new judges. His concern had been to assure a method of selection that would preclude the personal discretion of the disqualified judges. The court have positively refused to disclose when or how the temporary judges shall be appointed. For a number of reasons, he suspects something irregular in this business.

He believes that it would be unconstitutional for disqualified judges to appoint their replacements at personal discretion. See, e.g., Payne v. Lee, 222 Minn. 269 (1946). You suggested that Chapter 18 of the Laws of 1973 be amended with the words: "Provided that whenever a majority of the judges of the supreme court shall, from any cause, be disqualified from sitting in any case in said court, the governor, or, if he shall be interested in the result of such case, then the lieutenant governor shall assign judges of the district court of the state, who shall sit in place of such disqualified justices with all the powers and duties of the supreme court." The proposal is impartial, since it was the law of this State for some 80 years. It certainly is constitutional. See, e. g., State ex rel. Young v. Brill, 100 Minn. 499 (1907). If enacted into law, it would considerably dispell the appearances of impropriety.

I suggest further that the bill be heard in committee, with notice to all parties in Wild v. Rarig, et al., and the Supreme Court. I am authorized to advise you that Harry H. Peterson, former Judge of the Supreme Court, would like to testify in favor of the measure in committee.

Please be advised that my efforts

in behalf of this bill are personal. I am not acting in behalf of Dr. Wild or his senior counsel, Mr. Williams. All expressions of opinion herein are mine and mine alone.

Thanking you for your attention, I am

Respectfully yours,

/s/John Remington Graham"

At the dinner conversation on February 5, 1974, the Senator produced a draft of a bill in conformity with his prior suggestion. He asked your Affiant whether the Chief Justice of the Minnesota Supreme Court should be consulted, to which your Affiant gave emphatic assent, pointing to the penultimate full paragraph of the above-quoted letter. The Senator agreed to do so, saying that he would see the Chief Justice in a few days.

Sometime later your Affiant telephoned the office of Senator Borden to inquire concerning the bill. He was advised by a legislative assistant that the Chief Justice had been contacted; that no lawyer, including Senator Borden, wished to introduce the bill in his name; and that, nevertheless, the bill had been introduced

as Senate File No. 3406 by Senator David Schaaf (not an attorney). Senator Borden confirmed these facts to your Affiant, but declined to elaborate on the details. A day or two later, your Affiant spoke with Senator Schaaf, who advised that the bill had been sent to the Senate Committee on the Judiciary, but the Chairman, Senator Jack Davies, had caused the measure to be tabled without hearing.

Following appointment of the temporary Justices of the Minnesota Supreme Court, your Affiant caused to be filed the following Motions in Wild v. Rarig, et al.:

(Caption Omitted)

"To Hon. Robert J. Breunig, Glenn E. Kelly, Rolf Fosseen, L. J. Irvine, Donald C. Odden, Chester G. Rosengren, C. A. Rolloff, James E. Preece, William T. Johnson, District Court Judges appointed to sit as Supreme Court Justices Pro Tempore in the above entitled cause pursuant to Chapter 18 of Minnesota Laws of 1973, and each of them, Greeting:

Comes now the aforesaid Respondent, and hereby makes the following motions, to-wit:

FIRST: That the aforesaid temporary

justices, individually and collectively, submit to voir dire interrogation by counsel for the respective parties hereto as at common law in the selection of jurors, and to self-recusation upon peremptory challenge or challenge for cause. So moved inter alia, since Minnesota Statutes, Section 542.13 provides 'No judge shall sit in any cause . . . if he be interested in its determination, or if he might be excluded for bias from acting therein as a juror.'

SECOND: That further, the aforesaid temporary Justices order the permanent, disqualified Justices of the Minnesota Supreme Court to make public disclosure of the method by which the appointments herein pursuant to Chapter 18 of Minnesota Laws of 1973, were made and to disclose the nature and extent of contacts, if any, with the temporary Justices prior to their appointments. So moved, inter alia, because the parties herein are entitled to know how the temporary Justices of this cause are selected as a matter of due process of the laws, lest any impropriety in such selection, whether by reason of constitutional provision, statute, common law, equity or ethical principle, remain unknown to the parties herein, or the public at large.

THIRD: That, further or alternatively to the foregoing motions, the aforesaid temporary Justices declare unconstitutional as applied to this cause, Chapter 18 of Minnesota Laws of 1973. So moved, inter alia, because under the

doctrine of Payne v. Lee, 222 Minn. 269, 24 N.W. 2d 259 (1946), Article I, Section 8 of the Minnesota Constitution, and Amendment XIV of the United States Constitution prohibit any disqualified judge (in this case the permanent Justices of the Minnesota Supreme Court) from acting in any way, either privately or at personal discretion, in the cause wherein he is disqualified, and this per force includes private or discretionary appointment of any temporary Justices to decide such cause.

FOURTH: That, further or alternatively to the foregoing motions, the aforesaid temporary Justices declare null and void in general application, Chapter 18 of Minnesota Laws of 1973. So moved, inter alia, because said Chapter 18 was enacted through unethical, wrongful, fraudulent, tortious and felonious acts, quasi-fiduciary non-disclosure, concealment and misrepresentation of facts, of and by the official representative of the Minnesota Supreme Court, as then constituted, before one or more committees of the Minnesota Legislature during the month of February, A. D. 1973.

FIFTH: That, further or alternatively to the foregoing motions, the aforesaid temporary Justices recuse themselves from hearing the above entitled cause, on grounds stated in Motions the Third and Fourth above set forth.

SIXTH: That, in any event, the afore-

said temporary Justices schedule a public hearing of arguments and evidence on the foregoing motions, with full and formal notice to the parties herein on Monday, May 6, 1974 at 9:30 a.m. in Room 584 of the Federal Building, 316 North Robert Street, St. Paul, Minnesota, or at such other place and time before the said May 6, 1974 as is convenient to the temporary Justices, in order to assure conscientious and thorough consideration thereof, before the merits of the above entitled cause are argued orally by counsel.

SEVENTH: That such further and alternative relief be given as justice may warrant.

The aforesaid temporary Justices of the Minnesota Supreme Court are hereby notified that, under the pressing circumstances herein, Respondent will be compelled to assume tacit denial of the foregoing motions unless said motions are heard and decided on or before the aforestated May 6, 1974.

"JAMES MALCOLM WILLIAMS
and
JOHN REMINGTON GRAHAM
By/s/John Remington Graham
. . .
(Supporting Affidavit Omitted.)"

These motions were heard and denied on May 6, 1974, but the temporary Justices invited disclosure of the mode of their appointment, which theretofore had been

refused. In response, the following statement issued under the signature of Chief Justice Sheran (May 8, 1974):

(Caption Omitted)

"The acting justices in the above entitled matter having suggested that it would be appropriate that a statement be made for the record outlining the process by which selection of district judges to hear the above entitled matter was made, it is stated:

(1) That one district judge was selected from each of the judicial districts in the State of Minnesota except the Second Judicial District (Ramsey County), in which appellant Amherst H. Wilder Foundation conducts its principal charitable activities;

(2) That the Chief Judge of each of the nine judicial districts was invited to participate in the decision of this case. The Chief Judge of each judicial district is selected by the judges of that district.

(3) In three judicial districts the Chief Judge of the district was unable to accept the invitation to serve. In these instances, the district judge senior in point of service was selected."

Dr. Wild has not sought to investigate the lives or backgrounds of the temporary Justices by covert means, lest their privacy be evaded. Yet the following illus-

trative, public facts, which are by no means exclusive, tend to impeach the selection process: (1) All permanent Justices of the Minnesota Supreme Court, including Chief Justice Sheran, a former counsel for St. Paul Companies, and Justice Otis, a fiduciary of the Wilder Foundation, and stockholder in St. Paul Companies, appear to have participated in selecting the method, secretly and at personal discretion. (2) All permanent Justices are ex officio visitorial fiduciaries of the Wilder Foundation, and they have done nothing to nullify their appointments, although long a matter of public record, and frequently called to their attention in this case. (3) Judge Rosengren, the temporary Chief Justice, is a former counsel of St. Paul Companies. (4) Judge Fosseen, a temporary Justice, is a personal friend of Justice Otis. (5) There are about seventy well-qualified Judges of the Minnesota District Court from which an impeccable selection could have been made.

Several aspects of the per curiam opinion of the temporary Justices are suspect, for example: The major claim of Dr. Wild

sounds in tort, namely, defamation, governed by a two-year statute of limitations, and malicious interference with prospective advantage, governed by a six-year statute, both alternate causes of action built upon the same facts. Torts governed by the two-year statute do not survive death of either party, while those governed by the six-year statute do. Virtue v. Creamery Pkg. Mfg. Co., 123 Minn. 17, 142 N.W. 930 (1913). The temporary justices held that the six-year statute generally applies to a cause of action for malicious interference, but in this case will be governed by the two-year statute at retrial. No authority is cited for this special application of the two-year statute. Wild v. Rarig, 234 N.W. 2d 775 at 793 (Minn. 1975). Yet the established common law of Minnesota has been that where the same facts constitute two wrongs, one governed by a two-year statute, and the other governed by a six-year statute, recovery may be had under the six-year statute. See Burke v. Mayland, 149 Minn. 481, 184 N.W. 32 (1921), which was

called to the attention of the temporary Justices several times.

. . .

FURTHER SAYETH YOUR AFFIANT NAUGHT.

/s/John Remington Graham

Subscribed and sworn to
before me this 10th day
of February, 1976.

/s/M. Jacquelin Stevenson
Notary Public, Hennepin County, Minn.
My Commission expires Dec. 17, 1979.